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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 244.

GEORGE W. FRASHER, W. T. SOMES, HENRY McCLAIN, ISAAC DOTSON, AND JOEL C. BRUSH, PLAINTIFFS IN ERROR,

vs.

M. J. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JULY 22, 1882.

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1, 2, 3 & 4 In the Supreme Court of the State of California.

M. J. O'CONNOR, Plaintiff and Appellant
vs.
GEORGE W. FRASHER, W. T. SOMES, L. L. HOLBROOK, Henry McClain, R. Baldwin, S. H. Pitney, Isaac Dotson, and Joel G. Brush, Defendants and Respondents. } No. 7093.

Transcript on Appeal.

John D. Bicknell, attorney for plaintiff.
H. T. Hazard, attorney for defendant McClain.
Will D. Gould, J. H. Blanchard, attorneys for def'ts Frasher, Brush, Dotson, and Somes.

Indorsed: Filed March 23, 1880. Frank W. Gross, clerk supreme court, by John O. Wheeler, deputy.

Indorsed: Filed printed transcript March 31, 1880. Frank W. Gross, clerk, by John O. Wheeler, deputy.

5 *Complaint in Ejectment.*

In the District Court, Seventeenth Judicial District, State of California, in and for the County of Los Angeles.

M. J. O'CONNOR, Plaintiff,
vs.
GEORGE W. FRASHER, W. T. SOMES, L. L. HOLBROOK, HENRY McClain, R. Baldwin, S. H. Pitney, Isaac Dotson, and Joel G. Brush, Defendants. } 7093.

The plaintiff above-named, complaining of defendants above-named, for cause of action alleges:

That on the 10th day of April, A. D. 1876, the said plain-
6 tiff was the owner and seized in fee and possessed and entitled to the possession of all that certain lot of land situate in the county of Los Angeles, State of California, and described as follows, to wit:

The south half of the southwest quarter of section 23, the east half of section 27, all of section 26, and the southwest quarter of section 25; all in township 2 S., range 14 W., S. B. M.

That while the plaintiff was such owner, and so seized and possessed, and entitled to the possession of said land and premises, the said defendants did, on or about the day and year aforesaid, wrongfully and unlawfully, and without right of title, enter into and upon the same, and oust and eject the plaintiff therefrom, and, ever since that day, wrongfully and unlawfully have withheld, and still and now wrongfully and unlawfully do withhold the possession thereof from the plaintiff, to his wrong, injury, and damage, in the sum of one thousand dollars. That the value of the rents and profits on the said land and premises is six hundred dollars per annum, and that by reason of the unlawful withholding of the said land by the defendants as aforesaid, plaintiff has been deprived, and by the

continuance thereof will be deprived, of the use and occupation of the same, to his loss and damage in the sum of ——— dollars.

7 Wherefore the plaintiff prays judgment against the said defendants for the restitution of said land and premises, and for the sum of one thousand dollars damages for the withholding thereof, and six hundred dollars damage caused by the loss of the value of the rents and profits thereof, together with his costs of suit.

JOHN D. BICKNELL,
Attorney for Plaintiff.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

John D. Bicknell, being duly sworn, says: That he is attorney for the plaintiff in the above-entitled action. That M. J. O'Connor, the plaintiff herein, is absent from Los Angeles county, where this affiant resides. That he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

JOHN D. BICKNELL.

Subscribed and sworn to before me, this 21st day of November, A. D. 1876.

[SEAL.] H. O. BICKNELL,
Notary Public.

Filed November 21st, 1876.

8 *Separate Answer of G. W. Frasher.*

Title of Court and Cause.

Now comes George W. Frasher, one of the defendants in the above-entitled cause, leave of the court having been first obtained, and demanding for himself a separate trial, and, as his own separate answer to the plaintiff's complaint therein, denies:

1. That on the tenth day of April, 1876, or at any other time before or since said date, the plaintiff was the owner or was seized in fee, or possessed, or entitled to the possession of the tract of land in said complaint described, or any part thereof.

2. That he, on the said 10th day of April, or at any other time, wrongfully or unlawfully, or without right or title, entered into or upon said land and premises, or any part thereof, or ousted or ejected the plaintiff therefrom, or that he has since said 10th day of April, or any date, or at all, wrongfully or unlawfully withheld, or still or now wrongfully withholds, possession of said land, or any part thereof, from the plaintiff, or that by reason of any act or acts of defendant the plaintiff hath suffered wrong or injury, or damage in the sum of $5,000, or in any other sum whatever.

3. That the value of the rents and profits of said land and

9 premises is the sum of $3,000 per year, or that by reason of any act or acts of this defendant, or that by reason of un-

lawful withholding of said land, or any part thereof, the plaintiff has been deprived, or will be deprived, of the use or occupation of the same to his loss or damage in the sum of of $3,000, or any other sum.

4. And the defendant denies each and every allegation in said complaint contained.

Further answering, the defendant alleges that he has not now, nor ever did have, any interest in or possession of any portion of the land and premises in plaintiff's complaint described, other than the south ½ of S. W. ¼ of section 23, township 2 south, range 14 W., of San Bernardino base and meridian, and as to such land his possession of the same is valid.

And said defendant, for a further and separate answer and defense to the plaintiff's complaint, alleges:

1. That said land and premises last hereinbefore particularly, and in said complaint described, and the whole thereof, at the time said defendant entered and settled upon the particular or portion, and now possessed, occupied, claimed, and owned by him, as hereinafter mentioned and set forth, was unoccupied, uncultivated, unimproved,
10 and vacant public domain of the United States, and that said land, for more than ninety days prior to the date on which said defendant settled thereon, and prior to said 10th day of April, A. D. 1876, was duly surveyed by the United States authorities as public land, and the township plat including said land filed in the U. S. district land office at Los Angeles, California, in which district said land is situate, and said land was subject to the operations of the general laws of the United States pertaining to the disposition and possession and purchase of her public lands, and was, at and long prior to the time of the alleged entry and ouster complained of, subject to pre-emption settlement under the pre-emption laws of the United States, and that ever since the time of his said settlement he has held lawful possession, and now has the lawful right of possession, of the said land by him possessed, as hereinafter set forth.

2. That heretofore, to wit, on or about the 8th day of June, 1876, the defendant, under and by virtue of the pre-emption laws of the United States, and for the purpose and with the intention of availing himself of the provisions of said pre-emption laws, entered and settled upon the land claimed by him, the same being a part of the tract of land in plaintiff's complaint described, to wit, the S. ½ of S. W. ¼ of section 23, township 2 S., R. 14 W., of San Bernardino base
11 and meridian, and erected a dwelling-house, and made other valuable improvements upon the said land by him so settled upon and claimed, as above set forth and described, and has ever since resided upon and cultivated the same, claiming and holding it as a pre-emptor under the laws of the United States, and still and now so claims and holds the same, being absent occasionally a short time to provide support for his family.

3. That the defendant is and was, at the time he settled, as hereinbefore mentioned, a citizen of the United States, and the head of a family, over the age of twenty-one years, and has never had the

benefit of the pre-emption laws in any of the States or Territories of the United States, and did not quit or abandon his residence on his own land in said State to settle upon the public lands in said State, or said land described, and was not then and is not now the owner of 320 acres of land in any of the States or Territories of the United States; and said defendant was, at said date of his settlement, as aforesaid, a duly qualified pre-emption settler, and that he did not settle upon said land for the purpose of acquiring title thereto for any person other than himself, and neither has, directly or indirectly, made any agreement or contract with any person or persons whatever, whereby the title which he might acquire from the United States would inure in whole or in part to the benefit of any person or persons other than himself, and his said settle-
12 ment was not made for the purpose of speculation, but in good faith, and with the view of making said premises a home.

4. That said land is agricultural land, and not mineral land, and the same has not yet been proclaimed for sale.

5. That said defendant claims as aforesaid 80 acres of land only, and that said defendant thus claiming said land has fully complied with the pre-emption laws of the United States in every particular; that said defendant has, since his said entry upon said land, made known his claim in writing to the register of the proper land office, within the time prescribed by law, and has filed, or offered to file, in the U S. district land office in Los Angeles, California, in which district the lands are situated, his declaratory statement, in due form, and within the time prescribed by the United States pre-emption laws, for the said land claimed by him, and has paid to the register and receiver of said office the fees required therefor, and thereafter said defendant, having fully complied with the said pre-emption laws, duly made proof before said register and receiver of his settlement, residence upon, and improvements of said land, and his qualifications as a pre-emptor, and all proof required to be made in such cases, and tendered to them the Government price for said land, and all fees in full, and has, in all respects complied
13 with the requirements of said pre-emption laws, so far as he has been permitted to do so by said land officers, and that his said application to enter said land and tender of proof, and payment, etc., is now pending before the Land Department of the United States.

And by virtue of the full compliance with all the requirements of the pre-emption laws of the United States by defendant as aforesaid, the defendant has acquired title to the said tract claimed by him, and a vested interest therein from the Government of the United States, and is the owner of the same, and is entitled to a patent from the United States for the said tract of land so claimed and owned by him.

And for a further and separate answer and defense to the complaint of the plaintiff herein, the defendant alleges:

1. That the lands and premises by the plaintiff described, and

herein particularly described, and the whole thereof were at all times from the year 1837 until the 21st day of November, A. D. 1871, within the claimed and exterior limits of a valid Mexican grant, to wit, the Rancho Sausal Redondo, and were, at all times between the dates last aforesaid, claimed by the grantees of said rancho and their assigns as a part of said grant, and were thus reserved from other appropriation, and were not subject to selection by the
14 State of California, as indemnity school lands or otherwise, between said dates.

2. That plaintiff claims title to and right of possession and recovery of said land, and in no other way than by reason of a patent of the State of California, issued by the Governor of said State, in satisfaction and by reason of pretended, insufficient, and fraudulent applications illegally made for said land, on or about the 6th day of March, A. D. 1868; that said applications were thus made and accepted by the State locating agent prior to the survey of said land, and while said Rancho Sausal Redondo was still unsurveyed; that all of said land was applied for as aforesaid, and the applications were made in the interest and for the benefit of one W. S. Rosecrans, through whom plaintiff claims title, and said applications to purchase were pretended to have been made to the State of California, under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, but were in fact collusive and fraudulent, and in violation of said law, and the limitations thereof, which then did forbid, and have ever forbidden, the location of more than 320 acres of land, either directly or indirectly, for any one person, and were a part of a large class of like applications thus fraudulently made.

15 3. That said applications, approved as aforesaid, were the basis of pretended indemnity school land selections and locations by the State locating agent for the lands claimed and now owned by defendant, which selections and locations were illegal and void, and conferred no title upon said Rosecrans, or upon the plaintiff, or any other person or persons whomsoever, by reason of the facts herein set forth.

4. That in satisfaction of said pretended, illegal, and fraudulent applications and selections and locations, the Commissioners of the General Land Office of the United States, claiming to be acting under the provisions of the act of Congress of March 3, 1853, and the sixth section of the act of Congress of July 23, 1866, amendatory thereof, erroneously, illegally, and without authority, as defendant believes, fraudulently listed and certified said land to the State of California, which list was erroneously and illegally, as he believes, fraudulently approved by the Secretary of the Interior.

5. That said patented locations and selections in the name of the State, or by the State of California, of said land in 1868, were illegal and void, and the act of Congress of March 3d, 1853, or any amendment thereof, gave no force or effect to said locations or selec-
16 tions, and the approval of the list of said lands as aforesaid conveyed no right, title, claim, or interest therein to the State.

6. That the act of the Commissioners of the United States General Land Office, in certifying or listing said land to the State of California, was without authority, irregular, illegal, and ineffectual to vest in said State any right, title, claim, or interest therein or thereto.

7. That the plaintiff never had possession of the land claimed by the defendant as aforesaid, and in said complaint described, nor any part thereof, nor ever had any improvements thereon.

And for a further and separate answer and defence to the complaint of the plaintiff herein, the said defendant alleges:

1. That said applications, locations, and selections of the lands in dispute as aforsaid, and the plaintiff's claim of title thereto, are illegal and void, inasmuch as said applications, locations, or selections were made in lieu of certain 16th and 36th sections, which were, at the date of said applications and locations, and still are, unsurveyed lands of the United States, within townships, the plates of which have never been filed in the United States land office of the district in which said lands are situated, nor have
17 the township lines thereof been extended over said lands, nor had the same been determined to be within the limits of any Spanish or Mexican grant, by any final survey of such grant determined and approved at the time of said applications and locations, and said proceedings thereunder, nor were said 16th and 36th sections, or any part of thereof, otherwise, or in any way, ascertained to be lost to the State of California, and that the U. S. surveyor general for the State of California never furnished the State locating agent, or any of the State authorities, with a list or lists of said 16th and 36th sections, or any part thereof, in any way, as a basis of selection or location, or at all, or in any way certified that the same was so covered or in any way lost to the State.

2. That plaintiff's claim of title to said land and said patents from the State of California are null and void, and were obtained and made with full notice and knowledge of the fraudulent acts, and all the acts and facts hereinbefore set forth.

And for a further and separate answer and defense to the plaintiff's complaint the said defendant alleges:

1. That the plaintiff has no right, title, or interest in said land, provided the title ever passed from the United States to the State of California.

18 2. That provided the State of California ever acquired title to said land, the title thereto is still vested in said State.

3. That said defendant, not waiving his pre-emption claim to said land, has duly applied to the State of California to purchase any and all claim, right, title, and interest of the State in and to said land, which application is now pending and undetermined, and that the defendant is a duly qualified purchaser of said land from the State.

Wherefore the said defendant prays for judgment against the said plaintiff and for costs of suit.

WILL D. GOULD and
JAMES H. BLANCHARD,
Attorneys for Defendant.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

G. W. Frasher, being first duly sworn, deposes and says:

That he has heard read the foregoing answer and knows the contents thereof, and that the same is true, of his own knowledge, except to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

G. W. FRASHER.

19 Subscribed and sworn to before me, this 16th day of June, 1879.

A. W. POTTS, *Clerk*,
By D. M. ADAMS, *Deputy*.

Received copy of the foregoing answer this 16th day of June, 1879.

JNO. D. BICKNELL,
Per WHITE,
Attorney for Plaintiff.

Filed June 16th, 1879.

A. W. POTTS, *Clerk*,
By D. M. ADAMS, *Deputy Clerk*.

20 *Separate Answer of Joel G. Brush.*

[Title of Court and Cause.]

Now comes Joel G. Brush, one of the defendants in the above-entitled cause, leave of the court having been first obtained, and demanding for himself a separate trial, and, as his own separate answer to the plaintiff's complainant therein, denies:

1. That on the tenth day of April, 1876, or at any other time before or since said date, the plaintiff was the owner or was seized in fee, or possessed, or entitled to the possession of the tract of land in said complaint described, or any part thereof.

2. That he, on the said 10th day of April, or at any other time, wrongfully or unlawfully, or without right or title, entered into or upon said land and premises, or any part thereof, or ousted or ejected the plaintiff therefrom, or that he has since said 10th day of April, or any date, or at all wrongfully or unlawfully withheld, or still or now wronfully withholds possession of said land, or any part thereof, from the plaintiff, or that by reason of any act or acts of defendant the plaintiff hath suffered wrong, or injury, or damage in the sum of $5,000, or in any other sum whatever.

21 3. That the value of the rents and profits of said land and premises is the sum of $3,000 per year, or that by reason of any act or acts of this defendant, or that by reason of unlawful withholding of said land, or any part thereof, the plaintiff has been deprived, or will be deprived, of the use or occupation of the same to his loss or damage in the sum of $3,000, or any other sum.

4. And the defendant denies each and every allegation in said complaint contained.

Further answering, the defendant alleges that he has not now, nor ever did have, any interest in or possession of any portion of the land and premises in plaintiff's complaint described, other than the S. W. ¼ of section 25, township 2 south, range 14 W., of San Bernardino base and meridian, and as to such land his possession of the same is valid.

And said defendant, for a further and separate answer and defense to the plaintiff's complaint, alleges:

1. That said land and premises last hereinbefore particularly, and in said complaint described, and the whole thereof, at the time said defendant entered and settled upon the particular tract or portion, and now possessed, occupied, claimed, and owned by him, as hereinafter mentioned and set forth, was unoccupied, uncultivated, unimproved, and vacant public domain of the United States, and that said land for more than ninety days
22 days prior to the date on which said defendant settled thereon, and prior to said 10th day of April, A. D. 1876, was duly surveyed by the United States authorities as public land, and the township plat including said land filed in the U. S. district land office at Los Angeles, California, in which district said land is situate, and said land was subject to the operations of the general laws of the United States pertaining to the disposition and possession of her public lands, and was, at and long prior to the time of the alleged entry and ouster complained of, subject to pre-emption settlement under the pre-emption laws of the United States, and that ever since the time of his said settlement he has held lawful possession, and now has the lawful right of possession of the said land by him possessed, as hereinafter set forth.

2. That heretofore, to wit, on or about the 7th day of June, 1876, the defendant, under and by virtue of the pre-emption laws of the United States, and for the purpose and with the intention of availing himself of the provisions of said pre-emption laws, entered and settled upon the land claimed by him, the same being a part of the tract of land in plaintiff's complaint described, to wit, the S. W. ¼ of section 25, township 2 S., R. 14 W., of San Bernardino base and meridian, and erected a dwelling house and made other valu-
23 able improvements upon the said land by him so settled upon and claimed, as above set forth and described, and has ever since resided upon and cultivated the same, claiming and holding it as a pre-emptor, under the laws of the United States, and still and now so claims and holds the same.

3. That the defendant is and was at the time he settled, as hereinbefore mentioned, a citizen of the United States, and the head of a family, and over the age of twenty-one years, and has never had the benefit of the pre-emption laws in any of the States or Territories of the United States, and did not quit or abandon his residence on his own land in said State to settle upon the public lands in said State, or said land described, and was not then and is not now the owner of 320 acres of land in any of the States or Territories of the United States; and said defendant was, at said date of settlement as aforesaid, a duly qualified pre-emption settler, and

that he did not settle upon said land for the purpose of acquiring title thereto for any person other than himself, and neither has, directly or indirectly, made any agreement or contract with any person or persons whatever, whereby the title which he might acquire from the United States would inure in whole or in part to the benefit of any person or persons other than himself, and his said settlement was not made for the purpose of speculation,
24 but in good faith, and with the view of making said premises a home.

4. That said land is agricultural land, and not mineral land, and the same has not yet been proclaimed for sale.

5. That said defendant claims, as aforesaid, 160 acres of land only, and that said defendant thus claiming said land has fully complied with the pre-emption laws of the United States in every particular; that said defendant has, since his said entry upon said land, made known his claim, in writing, to the register of the proper land office within the time prescribed by law, and has filed, or offered to file, in the U. S. district land office, in Los Angeles, California, in which district the lands are situated, his declaratory statement, in due form and within the time prescribed by the United States pre-emption laws, for the said land claimed by him, and has paid to the register and receiver of said office the fees required therefor, and thereafter said defendant, having fully complied with the said pre-emption laws, duly made proof before said register and receiver of his settlement, residence upon and improvements of said land, and his qualifications as a pre-emptor, and all proof required to be made in such cases, and tendered to them the Government price for said land, and all fees in full, and has in all respects
25 complied with the requirements of said pre-emption laws, so far as he has been permitted to do so by said land officers, and that his said application to enter said land and tender of proof and payment, etc., is now pending before the Land Department of the United States.

And by virtue of the full compliance with all the requirements of the pre-emption laws of the United States by defendant, as aforesaid, the defendant has acquired title to the said tract claimed by him, and a vested interest therein from the Government of the United States, and is the owner of the same, and is entitled to a patent from the United States for the said tract of land so claimed and owned by him.

And for a further and separate answer and defense to the complaint of the plaintiff herein, the defendant alleges:

1. That the land and premises by the plaintiff described, and herein particularly described, and the whole thereof were, at all times from the year 1837, until the 21st day of November, A. D. 1871, within the claimed and exterior limits of a valid Mexican grant, to wit, the Rancho Sausal Redondo, and were, at all times between the dates last aforesaid, claimed by the grantees of said rancho and their assigns as a part of said grant, and were thus reserved from other appropriation, and were not subject to

26 selection by the State of California, as indemnity school lands or otherwise, between said dates.

2. That plaintiff claims title to and right of possession and recovery of said land, and in no other way than by reason of a patent of the State of California, issued by the Governor of said State, in satisfaction and by reason of pretended, insufficient, and fraudulent applications illegally made for said land, on or about the 6th day of March, A. D. 1868; that said applications were thus made and accepted by the State locating agent prior to the survey of said land, and while said Rancho Sausal Redondo was still unsurveyed; that all of said land was applied for as aforesaid, and the applications were made in the interest and for the benefit of one W. S. Rosecrans, through whom plaintiff claims title, and said applications to purchase were pretended to have been made to the State of California, under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, but were in fact collusive and fraudulent, and in violation of said law and the limitations thereof, which then did forbid, and have ever forbidden, the location of more than 320 acres of land, either directly or indirectly, for any one person, and were a part of a large class of like applications thus fraudulently made.

27 3. That said applications, approved as aforesaid, were the basis of pretended indemnity school land selections and locations by the State locating agent for the lands claimed and now owned by defendant, which selections and locations were illegal and void, and conferred no title upon said Rosecrans or upon the plaintiff, or any other person or persons whomsoever, by reason of the facts herein set forth.

4. That in satisfaction of said pretended, illegal, and fraudulent applications and selections and locations, the Commissioners of the General Land Office of the United States, claiming to be acting under the provisions of the act of Congress of March 3, 1853, and the sixth section of the act of Congress of July 23d, 1866, amendatory thereof, erroneously, illegally, and without authority, as defendant believes, fraudulently listed and certified said land to the State of California, which list was erroneously and illegally, as he believes, fraudulently approved by the Secretary of the Interior.

5. That said pretended locations and selections in the name of the State or by the State of California of said land in 1868 were illegal and void, and the act of Congress of March 3d, 1853, or any amendment thereof, gave no force or effect to said locations

28 or selections, and the approval of the list of said lands as aforesaid conveyed no right, title, claim, or interest therein to the State.

6. That the act of the Commissioners of the United States General Land Office, in certifying or listing said land to the State of California, was without authority, irregular, illegal, and ineffectual to vest in said State any right, title, claim, or interest therein or thereto.

7. That the plaintiff never had possession of the land claimed by

the defendant as aforesaid and in said complaint described, nor any part thereof, nor ever had any improvements thereon.

And for a further and separate answer and defense to the complaint of the plaintiff herein, the said defendant alleges:

1. That said applications, locations, and selections of the lands in dispute as aforesaid, and the plaintiff's claim of title thereto, are illegal and void, inasmuch as said applications, locations, or selections were made in lieu of certain 16th and 36th sections, which were at the date of said applications and locations, and still are, unsurveyed lands of the United States within townships, the plates of which have never been filed in the United States land office of the district in which said lands are situated, nor have the township lines
29 thereof been extended over said lands, nor had the same been determined to be within the limits of any Spanish or Mexican grant by any final survey of such grant determined and approved at the time of said applications and locations and said proceedings thereunder, nor were said 16th and 36th sections or any part thereof otherwise or in any way ascertained to be lost to the State of California, and that the U. S. surveyor general for the State of California never furnished the State locating agent, or any of the State authorities, with a list or lists of said 16th and 36th sections or any part thereof in any way, as a basis of selection or location, or at all or in any way certified that the same was so covered or in any way lost to the State.

2. That plaintiff's claim of title to said land and said patents from the State of California are null and void, and were obtained and made with full notice and knowledge of the fraudulent acts and all the acts and facts hereinbefore set forth.

And for a further and separate answer and defense to the plaintiff's complaint, the said defendant alleges:

1. That the plaintiff has no right, title, or interest in said land, provided the title ever passed from the United States to the State of California.
30 2. That provided the State of California ever acquired title to said land, the title thereto is still vested in said State.

3. That said defendant, not waiving his pre-emption claim to said land, has duly applied to the State of California to purchase any and all claim, right, title, and interest of the State in and to said land, which application is now pending and undetermined; and that the defendant is a duly qualified purchaser of said land from the State.

Wherefore the said defendant prays for judgment against the said plaintiff, and for costs of suit.

WILL D. GOULD AND
JAMES H. BLANCHARD,
Attorneys for Defendant.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

Joel G. Brush, being first duly sworn, deposes and says:

That he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except

to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

JOEL C. BRUSH.

31 Subscribed and sworn to before me, this 14th day of June, 1879.

A. W. POTTS, *Clerk*,
By CHAS. E. JUDD, *Deputy*.

Received copy of the foregoing answer, this 16th day of June, 1879.

JNO. D. BICKNELL,
Attorney for Plaintiff,
Per WHITE.

Filed June 16th, 1879.

A. W. POTTS, *Clerk*,
By A. RIMPAU,
Deputy Clerk.

32 *Separate Answer of Isaac Dotson.*

Title of Court and Cause.

Now comes Isaac Dotson, one of the defendants in the above-entitled cause, leave of the court having been first obtained, and demanding for himself a separate trial, and, as his own separate answer to the plaintiff's complaint therein, denies:

1. That on the tenth day of April, 1876, or at any other time before or since said date, the plaintiff was the owner or was seized in fee, or possessed or entitled to the possession of the tract of land in said complaint described, or any part thereof.

2. That he, on the said 10th day of April or at any other time, wrongfully or unlawfully, or without right or title, entered into or upon said land and premises, or any part thereof, or ousted or ejected the plaintiff therefrom, or that he has since said 10th day of April, or any date, or at all, wrongfully or unlawfully withheld, or still or now wrongfully withholds possession of said land, or any part thereof, from the plaintiff, or that by reason of any act or acts of defendant the plaintiff hath suffered wrong, or injury, or damage in the sum of $5,000, or in any other sum whatever.

33 3. That the value of the rents and profits of said land and premises is the sum of $3,000 per year, or that by reason of any act or acts of this defendant, or that by reason of unlawful withholding of said land, or any part thereof, the plaintiff has been deprived, or will be deprived, of the use or occupation of the same to his loss or damage in the sum of $3,000, or any other sum.

4. And the defendant denies each and every allegation in said complaint contained.

Further answering, the defendant alleges that he has not now, nor ever did have, any interest in or possession of any portion of the land and premises in plaintiff's complaint described, other than the W. ½ of S. E. ¼ and E. ½ of S. W. ¼, Sec. 26, township 2 south, range

14 W. of San Bernardino base and meridian, and as to such land his possession of the same is valid.

And said defendant, for a further and separate answer and defense to the plaintiff's complaint, alleges:

1. That said land and premises last hereinbefore particularly and in said complaint described, and the whole thereof, at the time said defendant entered and settled upon the particular tract or portion, and now possessed, occupied, claimed, and owned by him as hereinafter mentioned and set forth, was unoccupied, uncultivated, unimproved, and vacant public domain of the United States, and
34 that said land for more than ninety days prior to the date on which said defendant settled thereon, and prior to said 10th day of April, A. D. 1876, was duly surveyed by the United States authorities as public land, and the township plat including said land filed in the U. S. district land office at Los Angeles, California, in which district said land is situate, and said land was subject to the operations of the general laws of the United States pertaining to the disposition and possession and purchase of her public lands, and was, at and long prior to the time of the alleged entry and ouster complained of, subject to pre-emption settlement under the pre-emption laws of the United States, and that ever since the time of his said settlement he has held lawful possession, and now has the lawful right of possession of the said land by him possessed, as hereinafter set forth.

2. That heretofore, to wit, on or about the 4th day of April, 1876, the defendant, under and by virtue of the pre-emption laws of the United States, and for the purpose and with the intention of availing himself of the provisions of said pre-emption laws, entered and settled upon the land claimed by him, the same being a part of the tract of land in plaintiff's complaint described, to wit: The W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, section 26, township 2 S., R. 14 W., of San Bernardino base and meridian; and erected a dwelling-house and made other valuable improvements upon the said land
35 by him so settled upon and claimed, as above set forth and described, and has ever since resided upon and cultivated the same, claiming and holding it as a pre-emptor, under the laws of the United States, and still and now so claims and holds the same.

3. That the defendant is, and was, at the time he settled, as hereinbefore mentioned, a citizen of the United States, and the head of a family, over the age of twenty-one years, and has never had the benefit of the pre-emption laws in any of the States or Territories of the United States, and did not quit or abandon his residence on his own land in said State to settle upon the public lands in said State, or said land described; and was not then, and is not now, the owner of 320 acres of land in any of the States or Territories of the United States; and said defendant was, at said date of his settlement, as aforesaid, a duly qualified pre-emption settler, and that he did not settle upon said land for the purpose of acquiring title thereto for any person other than himself, and neither has, directly or indirectly, made any agreement or contract with any person or persons whatever, whereby the title which he might acquire from the United

States would inure in whole or in part to the benefit of any person or persons other than himself, and his said settlement was
36 not made for the purpose of speculation, but in good faith, and with the view of making said premises a home.

4. That said land is agricultural land, and not mineral land, and the same has not yet been proclaimed for sale.

5. That said defendant claims, as aforesaid, 160 acres of land only, and that said defendant, thus claiming said land, has fully complied with the pre-emption laws of the United States in every particular; that said defendant has, since his said entry upon said land, made known his claim, in writing, to the register of the proper land office, within the time prescribed by law, and has filed, or offered to file, in the U. S. district land office in Los Angeles, California, in which district the lands are situated, his declaratory statement, in due form, and within the time prescribed by the United States pre-emption laws, for the said land claimed by him, and has paid to the register and receiver of said office the fees required therefor, and thereafter said defendant, having fully complied with the said pre-emption laws, duly made proof before said register and receiver of his settlement, residence upon, and improvements of said land, and his qualifications as a pre-emptor, and all proof required to be made in such cases, and tendered to them the Government price for said land, and all fees in full, and has in all respects complied with the re-
37 quirements of said pre-emption laws, so far as he has been permitted to do so by said land officers, and that his said application to enter said land and tender of proof and payment, etc., is now pending before the Land Department of the United States.

And by virtue of the full compliance with all the requirements of the pre-emption laws of the United States by defendant, as aforesaid, the defendant has acquired title to the said tract claimed by him, and a vested interest therein from the Government of the United States, and is the owner of the same, and is entitled to a patent from the United States for the said tract of land so claimed and owned by him.

And for a further and separate answer and defense to the complaint of the plaintiff herein the defendant alleges:

1. That the lands and premises by the plaintiff described, and herein particularly described, and the whole thereof, were at all times from the year 1837 until the 21st day of November, A. D. 1871, within the claimed and exterior limits of a valid Mexican grant, to wit, the Rancho Sausal Redondo, and were at all times between the dates last aforesaid claimed by the grantees of said rancho and their assigns as a part of said grant, and were thus reserved from other appropriation, and were not subject to
38 selection by the State of California as indemnity school lands, or otherwise, between said dates.

2. That plaintiff claims title to and right of possession and recovery of said land, and in no other way than by reason of a patent of the State of California, issued by the Governor of said State, in satisfaction and by reason of pretended, insufficient, and fraudulent applications illegally made for said land on or about the 6th day of

March, A. D. 1868; that said applications were thus made and accepted by the State locating agent prior to the survey of said land, and while said Rancho Sausal Redondo was still unsurveyed; that all of said land was applied for as aforesaid, and the applications were made in the interest and for the benefit of one W. S. Rosecrans, through whom plaintiff claims title, and said applications to purchase were pretended to have been made to the State of California, under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, but were in fact collusive and fraudulent, and in violation of said law and the limitations thereof, which then did forbid, and have ever forbidden, the location of more than 320 acres of land, either directly or indirectly, for any one person, and were a part of a large class of like applications thus fraudulently made.

39 3. That said applications, approved as aforesaid, were the basis of pretended indemnity school land selections and locations by the State locating agent for the lands claimed and now owned by defendant, which selections and locations were illegal and void, and conferred no title upon said Rosecrans, or upon the plaintiff, or any other person or persons whomsoever, by reason of the facts herein set forth.

4. That in satisfaction of said pretended, illegal, and fraudulent applications and selections and locations, the Commissioners of the General Land Office of the United States, claiming to be acting under the provisions of the act of Congress of March 3, 1853, and the sixth section of the act of Congress of July 23d, 1866, amendatory thereof, erroneously, illegally, and without authority, as defendant believes, fraudulently listed and certified said land to the State of California, which list was erroneously and illegally, as he believes, fraudulently approved by the Secretary of the Interior.

5. That said pretended locations and selections in the name of the State, or by the State of California, of said land in 1868, were illegal and void, and the act of Congress of March 3d, 1853, or any amendment thereof, gave no force or effect to said locations or selec-

40 tions, and the approval of the list of said lands as aforesaid conveyed no right, title, claim, or interest therein to the State.

6. That the act of the Commissioners of the United States General Land Office, in certifying or listing said land to the State of California, was without authority, irregular, illegal, and ineffectual to vest in said State any right, title, claim, or interest therein or thereto.

7. That the plaintiff never had possession of the land claimed by the defendant as aforesaid, and in said complaint described, nor any part thereof, nor ever had any improvement thereon.

And for a further and separate answer and defense to the complaint of the plaintiff herein, the said defendant alleges:

1. That said applications, locations, and selections of the lands in dispute as aforesaid, and the plaintiff's claim of title thereto, are illegal and void, inasmuch as said applications, locations, or selections were made in lieu of certain 16th and 36th sections, which were, at the date of said applications and locations, and still are, unsurveyed lands of the United States, within townships, the plates of

which have never been filed in the United States land office of the district in which said lands are situated, nor have the
41 township lines thereof been extended over said lands, nor had the same been determined to be within the limits of any Spanish or Mexican grant, by any final survey of such grant, determined and approved at the time of said applications and locations and proceedings thereunder, nor were said 16th and 36th sections, or any part thereof otherwise or in any way ascertained to be lost to the State of California, and that the U. S. surveyor general for the State of California never furnished the State locating agent, or any of the State authorities, with a list or lists of said 16th and 36th sections, or any part thereof, in any way, as a basis of selection or location, or at all, or in any way certified that the same was so covered or in any way lost to the State.

2. That plaintiff's claim of title to said land, and said patents from the State of California, are null and void, and were obtained and made with full notice and knowledge of the fraudulent acts, and all the acts and facts hereinbefore set forth.

And for a further and separate answer and defense to the plaintiff's complaint, the said defendant alleges:

1. That the plaintiff has no right, title, or interest in said land, provided the title ever passed from the United States to the State of California.

42 2. That provided the State of California ever acquired title to said land, the title thereto is still vested in said State.

3. That said defendant, not waiving his pre-emption claim to said land, has duly applied to the State of California to purchase any and all claim, right, title, and interest of the State in and to said land, which application is now pending and undetermined, and that the defendant is a duly qualified purchaser of said land from the State.

Wherefore the said defendant prays for judgment against the said plaintiff, and for costs of suit.

WILL D. GOULD AND
JAMES H. BLANCHARD,
Attorneys for Defendant.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

Isaac Dotson, being first duly sworn, deposes and says:

That he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

ISAAC DOTSON.

43 Subscribed and sworn to before me, this 19th day of June, 1879.

A. W. POTTS, *Clerk,*
By A. RIMPAU, *Deputy.*

Received copy of the foregoing answer this 19th day of June, 1879.

JNO. D. BICKNELL,
Attorney for Plaintiff.

Filed June 19th, 1879.

A. W. POTTS, *Clerk,*
By A. RIMPAU,
Deputy Clerk.

44 *Separate Answer of W. T. Somes.*

[Title of Court and Cause.]

Now comes W. T. Somes, one of the defendants in the above-entitled cause, leave of the court having been obtained, and demanding for himself a separate trial, and, as his own separate answer to the plaintiff's complaint therein, denies:

1. That on the tenth day of April, 1879, or at any other time before or since said date, the plaintiff was the owner or was seized in fee or possessed or entitled to the possession of the tract of land in complaint described, or any part thereof.

2. That he, on the said 10th day of April, or at any other time, wrongfully or unlawfully, or without right or title, entered into or upon said land and premises, or any part thereof, or ousted or ejected the plaintiff therefrom, or that he has, since said 10th day of April or any date or at all, wrongfully or unlawfully withheld, or still or now wrongfully withholds possession of said land, or any part thereof, from the plaintiff, or that by reason of any act or acts of defendant the plaintiff hath suffered wrong or injury or damage in the sum of $5,000, or in any other sum whatever.

3. That the value of the rents and profits of said land and
45 premises is the sum of $3,000 per year, or that by reason of any act or acts of this defendant, or that by reason of unlawful withholding of said land, or any part thereof, the plaintiff has been deprived, or will be deprived, of the use or occupation of the same to his loss or damage in the sum of $3,000, or any other sum.

4. And the defendant denies each and every allegation in said complaint contained.

Further answering, the defendant alleges that he has not now, nor ever did have, any interest in or possession of any portion of the land and premises in plaintiff's complaint described, other than the N. E. ¼ of section 27, township 2 south, range 14 W., of San Bernardino base and meridian, and as to such land his possession of the same is valid.

And said defendant, for a further and separate answer and defense to the plaintiff's complaint, alleges:

1. That said land and premises last hereinbefore particularly, and in said complaint described, and the whole thereof, at the time said defendant entered and settled upon the particular tract or portion, and now possessed, occupied, claimed, and owned by him, as hereinafter mentioned and set forth, was unoccupied, uncultivated, unim-

proved, and vacant public domain of the United States, and
46 that said land for more than ninety days prior to the date on which said defendant settled thereon, and prior to said 10th day of April, A. D. 1876, was duly surveyed by the United States authorities as public land, and the township plat including said land filed in the U. S. district land office at Los Angeles, California, in which district said land is situate, and said land was subject to the operations of the general laws of the United States pertaining to the disposition and possession and purchase of her public lands, and was, at and long prior to the time of the alleged entry and ouster complained of, subject to pre-emption settlement under the pre-emption laws of the United States, and that ever since the time of his said settlement he has held lawful possession, and now has the lawful right of possession, of the said land by him possessed, as hereinafter set forth.

2. That heretofore, to wit, on or about the 5th day of June, 1876, the defendant, under and by virtue of the pre-emption laws of the United States, and for the purpose and with the intention of availing himself of the provisions of said pre-emption laws, entered and settled upon the land claimed by him, the same being a part of the tract of land in plaintiff's complaint described, to wit, the N. E. ¼ of section 27, township 2 S., R. 14 W., of San Bernardino base and meridian, and erected a dwelling-house, and made other
47 valuable improvements upon the said land by him so settled upon and claimed, as above set forth and described, and has ever since resided upon and cultivated the same, claiming and holding it as a pre-emptor under the laws of the United States, and still and now so claims and holds the same.

3. That the defendant is and was at the time he settled, as hereinbefore mentioned, a citizen of the United States, and over the age of twenty-one years, and has never had the benefit of the pre-emption laws in any of the States or Territories of the United States, and did not quit or abandon his residence on his own land in said State to settle upon the public lands in said State, or said land described, and was not then, and is not now, the owner of 320 acres of land in any of the States or Territories of the United States; and said defendant was, at said date of his settlement as aforesaid, a duly qualified pre-emption settler, and that he did not settle upon said land for the purpose of acquiring title thereto for any person other than himself, and neither has, directly or indirectly, made any agreement or contract with any person or persons whatever, whereby the title which he might acquire from the United States would inure in whole or in part to the benefit of any person or persons other than himself, and his said settlement was not made for
48 the purpose of speculation, but in good faith, and with the view of making said premises a home.

4. That said land is agricultural land, and not mineral land, and the same has not yet been proclaimed for sale.

5. That said defendant claims, as aforesaid, 160 acres of land only, and that said defendant thus claiming said land has fully complied with the pre-emption law of the United States in every particular;

that said defendant has, since his said entry upon said land, made known his claim, in writing, to the register of the proper land office, within the time prescribed by law, and has filed, or offered to file, in the U. S. district land office in Los Angeles, California, in which district the lands are situated, his declaratory statement, in due form, and within the time prescribed by the United States pre-emption laws, for the said land claimed by him, and has paid to the register and receiver of said office the fees required therefor, and thereafter said defendant, having fully complied with the said pre-emption laws, duly made proof before said register and receiver of his settlement, residence upon, and improvements of said land, and his qualifications as a pre-emptor, and all proof required to be made in such cases, and tendered to them the Government price for said land, and all fees in full, and has, in all respects, complied with the re-
49 quirements of said pre-emption laws, so far as he has been permitted to do so by said land officers, and that his said application to enter said land and tender of proof and payment, etc., is now pending before the Land Department of the United States.

And by virtue of the full compliance with all the requirements of the pre-emption laws of the United States by defendant, as aforesaid, the defendant has acquired title to the said tract claimed by him, and a vested interest therein, from the Government of the United States, and is the owner of the same, and is entitled to a patent from the United States for the said tract of land so claimed and owned by him.

And for a further and separate answer and defense to the complaint of the plaintiff herein, the defendant alleges:

1. That the lands and premises by the plaintiff described, and herein particularly described, and the whole thereof, were, at all times from the year 1837 until the 21st day of November, A. D. 1871, within the claimed and exterior limits of a valid Mexican grant, to wit, the Rancho Sausal Redonda, and were, at all times between the dates last aforesaid, claimed by the grantees of said rancho and their assigns as a part of said grant, and were thus reserved from other appropriation, and were not subject to
50 selection by the State of California, as indemnity school lands or otherwise, between said dates.

2. That plaintiff claims title to and right of possession and recovery of said land, and in no other way than by reason of a patent of the State of California, issued by the Governor of said State, in satisfaction and by reason of pretended, insufficient, and fraudulent applications illegally made for said land, on or about the 6th day of March, A. D. 1868; that said applications were thus made and accepted by the State locating agent, prior to the survey of said land, and while said Rancho Sausal Redondo was still unsurveyed; that all of said land was applied for as aforesaid, and the applications were made in the interest and for the benefit of one W. S. Rosecrans, through whom plaintiff claims title, and said applications to purchase were pretended to have been made to the State of California, under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th,

1863, but were in fact collusive and fraudulent, and in violation of said law, and the limitations thereof, which then did forbid, and have ever forbidden, the location of more than 320 acres of land, either directly or indirectly, for any one person, and were a part of a large class of like applications thus fraudulently made.

51 3. That said applications, approved as aforesaid, were the basis of pretended indemnity school land selections and locations by the State locating agent for the lands claimed and now owned by defendant, which selections and locations were illegal and void, and conferred no title upon said Rosecrans, or upon the plaintiff, or any other person or persons whomsoever, by reason of the facts herein set forth.

4. That in satisfaction of said pretended, illegal, and fraudulent applications and selections and locations, the Commissioners of the General Land Office of the United States, claiming to be acting under the provisions of the act of Congress of March 3, 1853, and the sixth section of the act of Congress of July 23d, 1866, amendatory thereof, erroneously, illegally, and without authority, as defendant believes, fraudulently listed and certified said land to the State of California, which list was erroneously and illegally, as he believes, fraudulently approved by the Secretary of the Interior.

5. That said pretended locations and selections in the name of the State or by the State of California of said land in 1868 were illegal and void, and the act of Congress of March 3d, 1853, or any amendment thereof, gave no force or effect to said locations

52 or selections, and the approval of the list of said lands, as aforesaid, conveyed no right, title, claim, or interest therein to the State.

6. That the act of the Commissioners of the United States General Land Office, in certifying or listing said land to the State of California, was without authority, irregular, illegal, and ineffectual to vest in said State any right, title, claim, or interest therein or thereto.

7. That the plaintiff never had possession of the land claimed by the defendant, as aforesaid, and in said complaint described, nor any part thereof, nor ever had any improvements thereon.

And for a further and separate answer and defense to the complaint of the plaintiff herein, the said defendant alleges:

1. That said applications, locations, and selections of the lands in dispute, as aforesaid, and the plaintiff's claim of title thereto, are illegal and void, inasmuch as said applications, locations, or selections were made in lieu of certain 16th and 36th sections, which were, at the date of said applications and locations, and still are, unsurveyed lands of the United States, within townships the plates of which have never been filed in the United States land office of the district in which said lands are situated, nor have the

53 township lines thereof been extended over said lands, nor had the same been determined to be within the limits of any Spanish or Mexican grant, by any final survey of such grant, determined and approved at the time of said applications and locations, and said proceedings thereunder, nor were said 16th and 36th

sections, or any part *of* thereof, otherwise or in any way ascertained to be lost to the State of California, and that the U. S. surveyor general for the State of California never furnished the State locating agent, or any of the State authorities, with a list or lists of said 16th and 36th sections, or any part thereof, in any way, as a basis of selection or location, or at all or in any way certified that the same was so covered or in any way lost to the State.

2. That plaintiff's claim of title to said land, and said patents, from the State of California, are null and void, and were obtained and made with full notice and knowledge of the fraudulent acts, and all the acts and facts hereinbefore set forth.

And for a further and separate answer and defense to the plaintiff's complaint, the said defendant alleges:

1. That the plaintiff has no right, title, or interest in said land, provided the title ever passed from the United States to the State of California.

54 2. That provided the State of California ever acquired title to said land, the title thereto is still vested in said State.

3. That said defendant, not waiving his pre-emption claim to said land, has duly applied to the State of California to purchase any and all claim, right, title, and interest of the State in and to said land, which application is now pending and undetermined; and that the defendant is a duly qualified purchaser of said land from the State.

Wherefore the said defendant prays for judgment against the said plaintiff, and for costs of suit.

WILL D. GOULD AND
JAMES H. BLANCHARD,
Attorneys for Defendant.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

W. T. Somes, being first duly sworn, deposes and says:

That he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

W. T. SOMES.

55 Subscribed and sworn to before me, this 26th day of September, 1879.

A. W. POTTS, *Clerk.*

Received copy of the foregoing answer, this 30th day of September, 1879.

JNO. D. BICKNELL,
Attorney for Plaintiff.

Filed September 26th, 1879.

A. W. POTTS, *Clerk.*

56 *Separate Answer of Harvey McClain.*

Title of Court and Cause.

Now comes Harvey McClain, one of the defendants in the above-entitled cause, leave of the court having been first obtained, and demanding for himself a separate trial, and, as his own separate answer to the plaintiff's complaint therein, denies:

1. That on the tenth day of April, 1876, or at any other time before or since said date, the plaintiff was the owner or was seized in fee, or possessed or entitled to the possession of the tract of land in said complaint described, or any part thereof.

2. That he, on the said 10th day of April, or at any other time, wrongfully or unlawfully, or without right or title, entered into or upon said land or premises, or any part thereof, or ousted or ejected the plaintiff therefrom; or that he has, since said 10th day of April, or any date, or at all, wrongfully or unlawfully withheld, or still or now wrongfully withholds, possession of said land, or any part thereof, from the plaintiff, or that by reason of any act or acts of defendant plaintiff hath suffered wrong, or injury, or damage in the sum of $5,000, or in any other sum whatever.

3. That the value of the rents and profits of said land and
57 premises is the sum of $3,000 per year, or that by reason of any act or acts of this defendant, or that by reason of unlawful withholding of said land, or any part thereof, the plaintiff has been deprived, or will be deprived, of the use or occupation of the same to his loss or damage in the sum of $3,000, or any other sum.

4. And the defendant denies each and every allegation in said complaint contained.

Further answering, the defendant alleges that he has not now, nor ever did have, any interest in or possession of any portion of the land and premises in plaintiff's complaint described other than the N. E. ¼ of section 26, township 2 south, range 14 W., of San Bernardino base and meridian, and as to such land his possession of the same is valid.

And said defendant, for a further and separate answer and defense to the plaintiff's complaint, alleges:

1. That said land and premises last hereinbefore particularly and in said complaint described, and the whole thereof, at the time said defendant entered and settled upon the particular tract or portion, and now possessed, occupied, claimed, and owned by him, as hereinafter mentioned and set forth, was unoccupied, uncultivated, unimproved, and vacant public domain of the United States, and that said land for
58 more than ninety days prior to the date on which said defendant settled thereon, and prior to said 10th day of April, A. D. 1876, was duly surveyed by the United States authorities as public land, and the township plat including said land filed in the U. S. district land office at Los Angeles, California, in which district said land is situate, and said land was subject to the operations of the general laws of the United States pertaining to the disposition and possession and purchase of her public lands, and was, at and long prior to the time of the alleged entry and ouster complained of, subject to pre-emption

settlement under the pre-emption laws of the United States, and that ever since the time of his said settlement he has held lawful possession, and now has the lawful right of possession, of the said land by him possessed, as hereinafter set forth.

2. That heretofore, to wit, on or about the 10th day of April, 1876, the defendant, under and by virtue of the pre-emption laws of the United States, and for the purpose and with the intention of availing himself of the provisions of said pre-emption laws, entered and settled upon the land claimed by him, the same being a part of the tract of land in plaintiff's complaint described, to wit: The N. E. ¼ of section 26, township 2 S., R. 14 W., of San Bernardino base
59 and meridian; and erected a dwelling-house, and has ever since resided upon and cultivated the same, claiming and holding it as a pre-emptor under the laws of the United States, and still and now so claims and holds the same.

3. That the defendant is, and was at the time he settled, as hereinbefore mentioned, a citizen of the United States, and the head of a family, over the age of twenty-one years, and has never had the benefit of the pre-emption laws in any of the States and Territories of the United States, and did not quit or abandon his residence on his own land in said State to settle upon the public lands in said State or said land described, and was not then, and is not now, the owner of 320 acres of land in any of the States or Territories of the United States; and said defendant was, at said date of his settlement as aforesaid, a duly qualified pre-emption settler, and that he did not settle upon said land for the purpose of acquiring title thereto for any person other than himself, and neither has, directly or indirectly, made any agreement or contract with any person or persons whatever whereby the title which he might acquire from the United States would inure, in whole or in part, to the benefit of any person or persons other than himself, and his said settlement was
60 not made for the purpose of speculation, but in good faith, and with the view of making said premises a home.

4. That said land is agricultural land, and not mineral land, and the same has not yet been proclaimed for sale.

5. That said defendant claims as aforesaid 160 acres of land only, and that said defendant thus claiming said land has fully complied with the pre-emption laws of the United States in every particular; that said defendant has, since his said entry upon said land, made known his claim, in writing, to the register of the proper land office within the time prescribed by law, and has filed, or offered to file, in the U. S. district land office in Los Angeles, California, in which district the lands are situated, his declaratory statement, in due form, and within the time prescribed by the United States pre-emption laws, for the said land claimed by him, and has paid to the register and receiver of said office the fees required therefor; and thereafter said defendant, having fully complied with the said pre-emption laws, duly made proof before said register and receiver of his settlement, residence upon, and improvements of said land, and his qualifications as a pre-emptor, and all proof required to be made in such cases, and tendered to them the Government price for said land, and

all fees in full, and has in all respects complied with the
61 requirements of said pre-emption laws so far as he has been permitted to do so by said land officers, and that his said application to enter said land and tender of proof and payment, etc., is now pending before the Land Department of the United States.

And by virtue of the full compliance with all the requirements of the pre-emption laws of the United States by defendant as aforesaid the defendant has acquired title to the said tract claimed by him and a vested interest therein from the Government of the United States, and is the owner of the same, and is entitled to a patent from the United States for the said tract of land so claimed and owned by him.

And for a further and separate answer and defense to the complaint of the plaintiff herein, the defendant alleges:

1. That the lands and premises by the plaintiff described, and herein particularly described, and the whole thereof, were at all times from the year 1837 until the 21st day of November, A. D. 1871, within the claimed and exterior limits of a valid Mexican grant, to wit, the Rancho Sausal Redondo, and were at all times between the dates last aforesaid claimed by the grantees of said rancho and their assigns as a part of said grant, and were thus reserved from other appropriation, and were not subject to selec-
62 tion by the State of California as indemnity school lands or otherwise between said dates.

2. That plaintiff claims title to and right of possession and recovery of said land, and in no other way than by reason of a patent of the State of California, issued by the Governor of said State, in satisfaction and by reason of pretended, insufficient, and fraudulent applications illegally made for said land, on or about the 6th day of March, A. D. 1868; that said applications were thus made and accepted by the State locating agent prior to the survey of said land, and while said Rancho Sausal Redondo was still unsurveyed; that all of said land was applied for as aforesaid, and the applications were made in the interest and for the benefit of one W. S. Rosecrans, through whom plaintiff claims title, and said applications to purchase were pretended to have been made to the State of California, under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, but were in fact collusive and fraudulent, and in violation of said law, and the limitations thereof, which then did forbid, and have ever forbidden, the location of more than 320 acres of land, either directly or indirectly, for any one person, and were a part of a large class of like applications thus fraudulently made.

63 3. That said applications, approved as aforesaid, were the basis of pretended indemnity school land selections and locations by the State locating agent for the lands claimed and now owned by defendant, which selections and locations were illegal and void, and conferred no title upon said Rosecrans, or upon the plaintiff, or any other person or persons whomsoever, by reason of the facts herein set forth.

4. That in satisfaction of said pretended, illegal, and fraudulent

applications and selections and locations the Commissioners of the General Land Office of the United States, claiming to be acting under the provisions of the act of Congress of March 3, 1853, and the sixth section of the act of Congress of July 23d, 1866, amendatory thereof, erroneously, illegally, and without authority, as defendant believes, fraudulently listed and certified said land to the State of California, which list was erroneously and illegally, as he believes, fraudulently approved by the Secretary of the Interior.

5. That said pretended locations and selections in the name of the State or by the State of California of said land in 1868 were illegal and void, and the act of Congress of March 3d, 1853, or any amendment thereof, gave no force or effect to said locations or selec-
64 tions, and the approval of the list of said lands, as aforesaid, conveyed no right, title, claim, or interest therein to the State.

6. That the act of the Commissioners of the United States General Land Office in certifying or listing said land to the State of California was without authority, irregular, illegal, and ineffectual to vest in said State any right, title, claim, or interest therein or thereto.

7. That the plaintiff never had possession of the land claimed by the defendant, as aforesaid, and in said complaint described, nor any part thereof, nor ever had any improvements thereon.

And for a further and separate answer and defense to the complaint of the plaintiff herein, the said defendant alleges:

1. That said applications, locations, and selections of the lands in dispute, as aforesaid, and the plaintiff's claim of title thereto, are illegal and void, inasmuch as said applications, locations, or selections were made in lieu of certain 16th and 36th sections, which were at the date of said applications and locations, and still are, unsurveyed lands of the United States within townships the plates of which have never been filed in the United States land office of the district in which said lands are situated, nor have the
65 township lines thereof been extended over said lands, nor had the same been determined to be within the limits of any Spanish or Mexican grant, by any final survey of such grant determined and approved at the time of said applications and locations, and said proceedings thereunder, nor were said 16th and 36th sections, or any part *of* thereof, otherwise or in any way ascertained to be lost to the State of California, and that the U. S. surveyor general for the State of California never furnished the State locating agent or any of the State authorities with a list or lists of said 16th and 36th sections, or any part thereof, in any way as a basis of selection or location, or at all, or in any way certified that the same was so covered or in any way lost to the State.

2. That plaintiff's claim of title to said land and said patents from the State of California are null and void, and were obtained and made with full notice and knowledge of the fraudulent acts and all the acts and facts hereinbefore set forth.

And for a further and separate answer and defense to the plaintiff's complaint, the said defendant alleges:

1. That the plaintiff has no right, title, or interest in said land, provided the title ever passed from the United States to the State of California.

66 2. That provided the State of California ever acquired title to said land, the title thereto is still vested in said State.

3. That said defendant, not waiving his pre-emption claim to said land, has duly applied to the State of California to purchase any and all claim, right, title, and interest of the State in and to said land, which application is now pending and undetermined; and that the defendant is a duly qualified purchaser of said land from the State.

Wherefore the said defendant prays for judgment against the said plaintiff, and for costs of suit.

H. T. HAZARD,
Attorney for Defendant.

Received copy Nov. 3d, 1879.

JNO. D. BICKNELL,
Attorney for Plaintiff.

Filed November 3d, 1879.

A. W. POTTS, *Clerk*,
By A. RIMPAU,
Deputy Clerk.

67 *Findings and Decision of Court.*

Title of Court and Cause.

This cause, above entitled, came on regularly for trial on the second day of October, 1879. The defendant, George W. Frasher, having demanded a separate trial, a separate trial was had before the court without a jury, a trial by jury having been duly waived by the respective parties, J. D. Bicknell, Esq., appearing as attorney for plaintiff, and Will D. Gould and James H. Blanchard, Esqs., for defendant; and, from the evidence introduced, the court finds the facts as follows, to wit:

I.

That the Rancho Susal Redondo was granted to Antonio Ygnacio Abila May 20th, 1837, by Juan B. Alvarado, Governor *ad interim*. A rude map accompanied the grant. June 4th, 1846, Pio Pico, constitutional governor, etc., having recited that Abila had proven the place to belong to him, granted the same. The board of land commissioners, June 10th, 1855, confirmed the claim to the land called Susal Redondo.

That at its December term, 1856, the U. S. district court for the southern district of California confirmed the claim of the ranch Sausal Redondo, and recited that the lands, of which con-

68 firmation is hereby made, are known by the name of Sausal Redondo and Guaspita, being the same lands granted by Juan B. Alvarado May 20th, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanied his original petition to the Governor for said lands, reference being had for more particular

description to the said original grant of said lands and the said map belonging thereto, filed in this cause and copied in said transcript, provided the lands contained in said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity and no more within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity. That this decree became final. That no judicial measurement has ever been made. That at the instance of W. S. Rosecrans, who paid for the survey, and who afterwards applied to the State to purchase the land in question, the Rancho Sausal Redondo was surveyed in February, 1868, by U. S. Surveyor Deputy Geo. Hansen.

That this survey did not embrace the lands in question. That the United States surveyor general attempted to extend the section and township lines over said lands, and township plats representing the survey of said land were filed in the United States district land office, at San Francisco, April 22d, 1868. That the grant
69 owners protested against said survey of the Rancho Sausal Redondo, made February, 1868, reciting:

1st. That the owners of that claim had applied to the surveyor general for the estimate of the expenses of a survey made under the act of 1864; and

2d. That notice of the survey, made February, 1868, had not been given to the parties in interest.

3d. That the segregation did not correspond with the said decree of confirmation, and demanded a survey to be made in accordance with said decree. That United States Surveyor General Upson, May 26th, 1868, recalled the township plat of the survey of the lands in question filed April 22d, 1868, from the United States district land office, and the same were then returned to him and another survey of Rancho Sausal Redondo was ordered, and was made July, 1868, by U. S. Deputy Surveyor Thompson.

That the survey of said rancho made July, 1868, embraced all of the lands in question, and was duly approved by Sherman Day, United States surveyor general, April 14th, 1869, as a part of said Rancho Sausal Redondo.

That these surveys of said Rancho Sausal Redondo, made
70 respectively February and July, 1868, came up regularly on appeal before the Commissioner of the General Land Office and the Secretary of the Interior of the United States, and were passed upon by said officers.

That on the 31st day of October, 1871, the Secretary of the Interior rejected the survey of July, 1868, of said Rancho Sausal Redondo, and directed that the said township plats of the land in question be returned to the United States land office.

That so much of said township plats as included the land in question were again suspended by the Commissioner of the General Land Office on the 18th day of March, 1872, by reason of being within the exterior limits of said rancho and of the claim made thereto by the owners of said grant, in their contest as to the survey

thereof and rights thereto; and the same was not again restored until the 15th day of June, 1872.

That the survey of February, 1868, with slight modifications, was approved by the Commissioner of the General Land Office March 22, 1875, upon which patent issued therefor on that day.

II.

That about the 6th day of March, 1868, W. S. Rosecrans procured for his own benefit a great number of men to make applications to purchase the lands from the State of California
71 described in plaintiff's complaint; that said applications purported to have been made under the provisions of an act entitled "An act to provide for the sale of certain land belonging to the State," approved April 27th, 1863, and none of said applications were signed by any person.

That each of said applicants conveyed by deed to one W. S. Rosecrans the lands for which he so applied; some of which deeds were made and executed immediately before, some at the time of, and others immediately after the applications were made as above. That neither the said applicants nor any one in their behalf ever paid the State of California for said applications or for the execution thereof, all expenses connected therewith being wholly borne by said Rosecrans. That the said applications and deeds were all one and the same transaction, and were wholly fraudulent and void *ab initio*, and were obtained in the behalf of said Rosecrans, who paid each applicant a sum of money therefor, and in fraud of the provisions of said act of April 27th, 1863. That said applicants were not informed by said Rosecrans or any other person of the contents of said applications, and that they did not read the affidavits accompanying said applications, nor were they informed by any officers authorized to take acknowledgments, or any other person, of the contents thereof, and were not sworn to any oath or affidavits connected therewith.

72 That the application of Robert Thompson for the land described in defendant's answer was one of said fraudulent applications, and was made May 1st, 1868, for the benefit of said Rosecrans, and was fraudulent; that said application was presented to the State locating agent and by him accepted and filed on the 1st day of May, 1868.

That said application was not accompanied by an affidavit of three disinterested persons, stating, among other things, that said applicant was a resident of the State, and that the lands were unoccupied by any person except the applicant, as required by said act of April 27th, 1863.

That said applicant omitted and neglected to file in the office of county recorder of the county in which the lands were situated a description of the lands applied for, with a certificate of the oath or affirmation endorsed thereon, as required by the 29th section of said act of April 27th, 1863.

III.

That plats including these lands, purporting to be township plats, were made and filed for the first time in the U. S. land office at San Francisco April 22d, 1868; that said plats were recalled by the U. S. surveyor general May 26th, 1868, and were never again filed in said land office.

73 That by reason of said application, Leander Ransom, State locating agent of the State of California, on May 27th, 1868, pretending to act under and by virtue of law and in part satisfaction of the grant by the United States to said State of other lands in lieu of the 16th and 36th sections for school purposes, under an act of Congress, approved March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for *the* purposes," and of an act of Congress, approved July 23d, 1866, entitled "An act to quiet land titles in California," selected and located the lands described in said application for the State of California.

That the selection and location of said land was the result of and made in satisfaction of said application, and corresponded with it in number and in the description of the land applied for.

That the United States surveyor general for the State of California never furnished the State authorities with a list or lists including any of the said 16th and 36th sections or any part thereof used by said State locating agent in said selection and location as a basis of selection, as required by section 6 of said act of Congress, approved July 23d, 1866.

74 That thereafter, by reason of said application, selection, and location, to wit, on the 23d and 24th days of November, 1871, and long prior to the lapse of the ninety days after filing of the township plats including said lands in the U. S. district land office, the Commissioner of the U. S. General Land Office and the Secretary of the Interier inadvertently and by mistake certified and listed said lands to the State of California, and that the lists including said lands was identical with said application, selection, and location in number, description of land selected, and none of said land thus selected was of the character contemplated by any act of Congress, or intended to be granted thereby.

V.

That on or about the 25th day of August, 1869, before said lands were legally surveyed, and when there was no township plats including said lands on file in the U. S. district land office, said W. S. Rosecrans made application to the surveyor general of the State of California, John W. Bost, to purchase and locate all of said described lands in the applications mentioned in the second finding, which were with them identical in description of land applied for, and the 16th and 36th sections used as a basis of said application.

That on the 27th day of August, 1869, Robert Gardiner, signing himself as the surveyor general of the State of California,

75 accepted said application at a time long prior to his election

or qualification for said office, and that said application was never accepted by any other person.

That thereafter, to wit, on the 10th day of February, 1872, Rob't Gardner, then surveyor general of the State of California, basing his approval upon the recital therein, to wit, "that the location has been made by the then locating agent in the name and for the benefit of the State of California, at the Los Angeles district, in the city of Los Angeles, with the consent of list No. 1 of said district, bearing date the 24th day of November, 1871," approved each of said applications.

That thereafter, and in consequence thereof, certificates of purchase and patents issued from the State of California for said land to W. S. Rosecrans.

That neither the plaintiff, M. J. O'Connor, nor said Rosecrans, nor the said Robert Thompson, nor either of them, were ever in the actual possession of said lands or any part thereof, or ever had any improvements thereon, or ever had any portion thereof fenced or enclosed in any way, and that all of said lands are rich agricultural lands, and that the plaintiff and his grantor have every year, since 1872, leased the land in controversy to persons who have used
76 the same for grazing purposes, pasturing sheep thereon, and have so used it until the defendant entered thereon.

That the plaintiff, M. J. O'Connor, bases his claim to said lands, and in no other way than by a deed to the same from W. S. Rosecrans, and the above procedure herein found.

VI.

That the township plats, including said lands, were on the 21st day of November, 1871, filed for the first time in the United States district land office at Los Angeles, California.

VII.

That at the time of making said application and selection the Rancho La Liebre, within the limits of which the W. ½ of section 16, T. 9 N., R. 17 W., S. B. M. was situated, which was the basis of said application and selection in finding second above, had been finally surveyed and located by the proper authorities of the United States, and said lands were, at the time of said application and selection, actually lost to the State of California as school lands by reason of such final survey.

VIII.

That said defendant, George W. Frasher, was a duly quali-
77 fied pre-emption settler, and fully entitled to the privileges of the pre-emption laws of the United States, and settled upon said tract of land claimed by him, as above found, in good faith, as such settler, and performed thereon all acts required by said pre-emption laws to entitle a person to pre-empt public land.

That on the 8th day of June, 1876, the defendant applied to the register and receiver of the U. S. district land office at Los Angeles,

Cal., to file his declaratory statement in due form upon said land, as required by the laws of the United States. That at the time of making said application the defendant was living on said land with his family, and had made valuable improvements thereon. That on said 8th day of June, 1876, said defendant did tender and deposit his declaratory statement in due form with the register and receiver of the proper U. S. district land office, together with all legal fees therefor.

That afterwards, to wit, on or about the 18th day of December, 1876, said defendant made the requisite and usual proofs before the register and receiver of said U. S. district land office of his qualifications and his settlement, and his improvements on said tract of land, and tendered the same in writing and deposited the same with said register and receiver, and at the same time tendered the full
78 Government price therefor, with all legal fees and commissions, and requested that he be permitted to enter said land at said land office under said pre-emption laws, and that said register and receiver refused to approve said claim of the defendant, and refused to permit him to enter said lands under said pre-emption laws, and refused to receive the purchase price tendered, and still so refuses.

That said defendant duly appealed from said action of the register and receiver, and that said claim is now pending before the U. S. General Land Office.

IX.

That on the —— day of ———, 1879, said defendant duly applied to the proper authorities of the State of California to purchase said land from the State, and that said application is now pending and undetermined.

X.

And the court further finds that the plaintiff had no right, title, or interest in said land at the time of the commencement of this action.

As conclusions of law from the foregoing facts the court finds:

I.

That none of said lands thus included within the boundaries or exterior limits of the private grant, to wit, the Rancho
79 Sausal Redondo, were public lands within the meaning of the acts of Congress granting lands to the State of California as school lands, or as State indemnity lands, until the 31st day of October, 1871, the date the said claim covering them was finally decided to be invalid, and all of such lands were thus excluded from any mode of acquirement. They were not in a condition to be applied for or acquired by individuals or selected by the State, and that the attempt of the surveyor general to remove the reservation and to extend the public survey over said lands, and the filing of township plats including the same in 1868, was without authority of the law,

and was wholly void. The evidence does not warrant the conclusion that the survey of the Rancho Sausal Redondo in 1868 was made by deputy Hansen under the 8th section of the act of Congress, 1866; on the contrary, the evidence shows that said survey was not made under said act or by authority thereof.

II.

That the defendant is in such privity with the United States, the paramount source of title, as enables him to attack the patent issued to plaintiff's grantors by the State for the land in controversy, and upon which plaintiff rests his title in an action at law or equity.

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III.

That the selection of said land was void as having been made without authority of law, and, being void, the State had no title which it could convey to plaintiff's grantor; that said land was not intended to be granted by any law of Congress, and the listing of said lands to the State by the Commissioner of the General Land Office was null and void, and the patents from the State for said lands are void, and the plaintiff as no title to said land or any part thereof.

IV.

That an invalid State selection is no bar to the rights of a preemption or homestead settler, and that the tender of proof and offer of payment by the defendant for said land placed him in the same relation as if the defendant had been permitted by the land office to do what in this respect was offered to be done.

Let judgment be entered accordingly as prayed for by defendant.

SEPULVEDA, *Judge.*

81

Judgment.

Title of Court and Cause.

This cause came on regularly for trial on the second day of October, 1879, a separate trial having been demanded by the defendant, George W. Frasher, a separate trial was had. J. D. Bicknell, Esq., appearing as counsel for plaintiff; M. J. O'Connor and Will D. Gould and James H. Blanchard, Esqs., for said defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury; whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and decision in writing, and orders that judgment be entered herein in favor of defendants in accordance therewith.

Wherefore by reason of the law and findings aforesaid it is ordered, adjudged, and decreed that plaintiff has no title to the land; that the claim of title of plaintiff and the patents and deeds under and

by virtue of which he claims his title are void and of no effect; that said patents be cancelled; that plaintiff be forever
82 enjoined from asserting any title to said land claimed by said defendant, to wit, the S. ½ of S. W. ¼ of section 23, T. 2 S., R. 14 W., S. B. M., and that this defendant have his costs and disbursements incurred in this action, amounting to the sum of $143.58.

SEPULVEDA, *Judge.*

December 29th, 1879.

Findings and judgment filed February 3d, 1880.

Findings and Decision of Court as to Defendant, J. C. Brush.

Title of Court and Cause.

This cause above entitled came on regularly for trial on the second day of October, 1879. The defendant, J. C. Brush, having demanded a separate trial, a separate trial was had before the court without a jury, a trial by jury having been duly waived by the respective parties, J. D. Bicknell, Esq., appearing as attorney for plaintiff, and Will D. Gould and James H. Blanchard, Esqs., for defendant, and, from the evidence introduced, the court finds the facts as follows, to wit:

I.

That the Rancho Susal Redondo was granted to Antonio Ygnacio Abila, May 20th, 1837, by Juan B. Alvarado, governor *ad*
83 *interim*. A rude map accompanied the grant. June 4th, 1846, Pio Pico, constitutional governor, having recited that Abila had proven the place to belong to him, granted the same. The board of land commissioners, June 10th, 1855, confirmed the claim to the land called Susal Redondo.

That, at its December term, 1856, the U. S. district court for the southern district of California confirmed the claim of the Rancho Sausal Redondo, and recited that the lands, of which confirmation is hereby made, are known by the name of Sausal Redondo and Guaspita, being the same lands granted by Juan B. Alvarado, May 20th, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanied his original petition to the governor for said lands, reference being had for more particular description to the said original grant of said lands, and the said map belonging thereto filed in this cause, and copied in said transcript, provided the lands contained in said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity and no more within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity. That this decree became final. That no judicial measurement had ever been made. That, at the instance of W. S. Rosecrans,
84 who paid for the survey, and who afterward applied to the State to purchase the lands in question, the Rancho Sausal

Redondo was surveyed in February, 1868, by U. S. surveyor deputy Geo. Hansen.

That this survey did not embrace the lands in question. That the United States surveyor general attempted to extend the section and township lines over said lands, and township plats representing the survey of said land were filed in the United States district land office at San Francisco April 22d, 1868. That the grant owners protested against said survey of the Rancho Sausal Redondo, made February, 1868, reciting—

1st. That the owners of that claim had applied to the surveyor general for the estimate of the expenses of a survey made under the act of 1864; and,

2d. That notice of the survey made February, 1868, had not been given to the parties in interest.

3d. That the segregation did not correspond with the said decree of confirmation, and demanded a survey to be made in accordance with said decree. That United States Surveyor General Upson, May 26th, 1868, recalled the township plats of the survey of the lands in question, filed April 22d, 1868, from the United States district
85 land office, and the same were then returned to him and another survey of the said Rancho Sausal Redondo was ordered, and was made July, 1868, by U. S. Deputy Surveyor Thompson.

That the survey of said rancho made July, 1868, embraced all of the lands in question, was duly approved by Sherman Day, United States surveyor general, April 14th, 1869, as a part of said Rancho Sausal Redondo.

That these surveys of said Rancho Sausal Redondo, made respectively February and July, 1868, came up regularly on appeal before the Commissioner of the General Land Office and the Secretary of the Interior of the United States, and were passed upon by said officers.

That on the 31st day of October, 1871, the Secretary of the Interior rejected the survey of July, 1868, of said Rancho Sausal Redondo, and directed that the said township plats of the land in question be returned to the United States Land Office.

That so much of said township plats as included the lands in question were again suspended by the Commissioner of the General Land Office on the 18th day of March, 1872, by reason of being within the exterior limits of said rancho and of the claim made thereto by the owners of said grant in their contest as to the survey thereof and rights thereto, and the same was not again restored until the 15th day of June, 1872.

86 That the survey of February, 1868, with slight modifications, was approved by the Commissioner of the General Land Office March 22d, 1875, upon which patent issued therefor on said day.

II.

That about the 6th day of March, 1868, W. S. Rosecrans procured for his own benefit a great number of men to make application to purchase the lands from the State of California described in plain-

tiff's complaint; that said applications purported to have been made under the provisions of an act, entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, and none of said applications were signed by any person.

That each of said applications conveyed by deed to one W. S. Rosecrans the lands for which he so applied; some of which deeds were made and executed immediately before, some at the time of, and others immediately after the applications were made as above. That neither the said applicants nor any one in their behalf ever paid the State of California for said applications or for the execution thereof, all expenses connected therewith being wholly borne by said Rosecrans. That the said applications and deeds were all one and the same transaction, and were wholly fraudulent and void *ab initio*, and were obtained in the behalf of said Rosecrans, who
87 paid each applicant a sum of money therefor, and in fraud of the provisions of said act of April 27th, 1863. That said applicants were not informed by said Rosecrans, or any other person, of the contents of said applications, and that they did not read the affidavits accompanying said applications, nor were they informed by any officers authorized to take acknowledgments, or any other person, of the contents thereof, and were not sworn to any oath or affidavits connected therewith.

That the application of —— for the land described in defendants' answer was one of said fraudulent applications, and was made ——, 1868, for the benefit of said Rosecrans, and was fraudulent; that said application was presented to the State locating agent, and by him accepted and filed on the 12th day of March, 1868.

That said application was not accompanied by an affidavit of three disinterested persons stating, among other things, that said applicant was a resident of the State, and that the lands were unoccupied by any person except the applicant, as required by said act of April 27th, 1863.

That said applicant omitted and neglected to file in the office of county recorder of the county in which the lands were situated a description of the lands applied for, with a certificate of the oath or affirmation endorsed thereon, as required by the 29th section of said act of April 27th, 1863.

88 III.

That the plats including these lands, purporting to be township plats, were made and filed for the first time in the U. S. land office at San Francisco, April 22d, 1868; that said plats were recalled by the U. S. surveyor general, May 26th, 1863, and were never again filed in said land office.

That by reason of said application, Leander Ranson, State Locating Agent of the State of California, on said 22d April, 1868, pretending to act under and by virtue of law and in part satisfaction of the grant by the United States to said State of other lands in lieu of the 16th and 36th sections for school purposes, under an act of Congress approved March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption

rights therein, and for other purposes," and an act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in California," selected and located the lands described in said application for the State of California.

That the selection and location of said land was the result of and made in satisfaction of said application, and corresponded with it in number and in the description of the land applied for.

That the United States surveyor general for the State of
89 California never furnished the State authorities with a list including any of the said 16th and 36th sections or any part thereof used by said State locating agent in said selection and location as a basis of selection as required by section 6 of said act of Congress approved July 23d, 1866.

That thereafter, by reason of said application, selection, and location, to wit, on the 23d and 24th days of November, 1871, and long prior to the lapse of the ninety days after filing of the township plats including said lands in the U. S. district land office, the Commissioner of the U. S. General Land Office and the Secretary of the Interior inadvertently and by mistake certified said listed lands to the State of California, and that the lists including said lands was identical with said application, selection, and location in number, description of land selected, and none of said land thus selected was of the character contemplated by any act of Congress, or intended to be granted thereby.

That on or about the 25th day of August, 1869, before said lands were legally surveyed, and when there was no township plat including said lands on file in the U. S. land office, said W. S. Rosecrans made application to the surveyor general of the State of California, John W. Bost, to purchase and locate all of said described lands in the applications mentioned in the second finding, which were
90 with them identical in description of land applied for, and the 16th and 36th sections used as a basis of said application.

That on the 27th day of August, 1869, Robert Gardiner, signing himself as the surveyor general of the State of California, accepted said application at a time long prior to his election or qualification for said office, and that said application was never accepted by any other person.

That thereafter, to wit, on the 10th day of February, 1872, Rob't Gardner, then surveyor general of the State of California, basing his approval upon the recital therein, to wit: "That the location has been made by then locating agent in the name and for the benefit of the State of California, at the Los Angeles district, in the city of Los Angeles, with the consent of List No. 1 of said district, bearing date the 24th day of November, 1871," approved each of said applications.

That thereafter, and in consequence thereof, certificates of purchase and patents issued from the State of California for said land to W. S.

That neither the plaintiff, M. J. O'Connor, nor said Rosecrans, nor the said Sylvester Rogers, nor either of them, were ever in the actual possession of said lands, or any part thereof, or ever had any

improvements thereon, or ever had any portion thereof fenced or closed in any way, and that all of said lands are rich agricul-
91 tural lands, and that the plaintiff and his grantor have every year, since 1872, leased the land in controversy to persons who have used the same for grazing purposes, pasturing sheep thereon, and have so used it until defendant entered thereon.

That the plaintiff, M. J. O'Connor, bases his claim to said lands, and in no other way than by a deed to the same from W. S. Rosecrans and the above procedure herein found.

VI.

That the township plats, including said lands, were on the 21st day of November, 1871, filed for the first time in the United States district land office at Los Angeles, California.

VII.

That, at the time of making said application and selection, the Rancho Sobrante San Jacinto, within the exterior limits of which the W. $\frac{1}{2}$ of section 16, T. 4 S., R. 5 W., S. B. M., the bases of said application and selection set forth in finding second above was situated, had not been finally surveyed and located by the United States, nor were said lands at the date of said application and selection lost to the State of California as school lands by reason of any final survey of said rancho by the United States authorities.

VIII.

92 That said defendant, J. C. Brush, was a duly qualified pre-emption settler, and fully entitled to the privilege of the pre-emption laws of the United States, and settled upon said tract of land claimed by him, as above found, in good faith as such settler, and performed thereon all acts required by said pre-emption laws to entitle a person to pre-empt public land.

That on the 7th day of June, 1876, the defendant applied to the register and receiver of the U. S. district land office, at Los Angeles, Cal., to file his declaratory statement, in due form, upon said land, as required by the laws of the United States; that at the time of making said application the defendant was living on said land with his family, and had made valuable improvements thereon; that on said 7th day of June, 1876, said defendant did tender and deposit his declaratory statement, in due form, with the register and receiver of the proper U. S. district land office, together with all legal fees therefor.

That afterwards, to wit, on or about the 9th day of June, 1877, said defendant made the requisite and usual proofs before the register and receiver of said U. S. district land office of his qualifications and his settlement, and his improvements on said tract of land, and tendered the same in writing, and deposited the same with said register and receiver, and at the same time tendered the full
93 Government price therefor, with all legal fees and commis-

sions, and requested that he be permitted to enter said land at said land office under said pre-emption laws, and that said register and receiver refused to approve said claim of the defendant, and refused to permit him to enter said lands under said pre-emption laws, and refused to receive the purchase price, and still so refuse.

That said defendant duly appealed from said action of the register and receiver, and that said claim is now pending before the U.S. General Land Office.

IX.

That on the —— day of ——, 1879, said defendant duly applied to the proper authorities of the State of California to purchase said land from the State, and that said application is now pending and undetermined.

X.

And the court further finds that the plaintiff had no right, title, or interest in said land at the time of the commencement of this action.

As conclusions of law from the foregoing facts, the court finds:

I.

That none of said lands thus included within the boundaries or exterior limits of the private grant, to wit, the Rancho Sausal Redondo, were public lands, within the meaning of the acts of Congress granting lands to the State of California, as school lands or as State indemnity lands, until the 31st day of October, 1871, the date the said claim covering them was finally decided to be invalid, and all of such lands were thus excluded from any mode of acquirement. They were not in condition to be applied for or acquired by individuals or selected by the State, and that the attempt of the Surveyor General to remove the reservation, and to extend the public survey over said lands, and the filing of township plats including the same, in 1868, was without authority of the law, and was wholly void. The evidence does not warrant the conclusion that the survey of the Rancho Sausal Redondo, in 1868, was made by Deputy Hansen, under the 8th section of the act of Congress, 1866. On the contrary, the evidence shows that said survey was not made under said act, or by authority thereof.

94

II.

That the defendant is in such privity with the United States, the paramount source of title, as enables him to attack the patent issued to plaintiff's grantors by the State for the lands in controversy, and upon which plaintiff rests his title in an action at law or in equity.

95

III.

The selection of said land was void, as having been made without authority of law, and, being void, the State had no title which

it could convey to plaintiff's grantor; that said land was not intended to be granted by any law of Congress, and the listing of said lands to the State by the Commissioner of the General Land Office was null and void, and the patents from the State for said lands are void, and the plaintiff has no title to said land or any part thereof.

IV.

That an invalid State selection is no bar to the rights of a preemption or homestead settler, and that the tender of proof and offer of payment by the defendant for said land placed him in the same relation as if defendant had been permitted by the Land Office to do what in this respect was offered to be done.

Let judgment be entered accordingly as prayed by defendant.

SEPULVEDA, *Judge.*

96 *Judgment.*

Title of Court and Cause.

This cause came on regularly for trial on the second day of October, 1879; a separate trial having been demanded by the defendant, J. C. Brush, a separate trial was had. J. D. Bicknell, Esq., appearing as counsel for plaintiff, M. J. O'Connor, and Will D. Gould and James H. Blanchard, Esqs., for said defendant. A trial by jury having been expressly waived by the respective parties, this cause was tried by the court without a jury; whereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and decision in writing, and orders that judgment be entered herein in favor of defendants in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that plaintiff has no title in the land; that the claim of title of plaintiff and the patents and deeds under and by virtue of which he claims title are void and of no effect; that said patents be cancelled; that the plaintiff be forever enjoined from asserting any title to said land claimed by
97 said defendant, J. C. Brush, to wit, to S. W. ¼ of section 25, T. 2 S., R. 14 W., S. B. M., and that the defendant have his costs and disbursements incurred in this action, amounting to the sum of $173.67.

SEPULVEDA, *Judge.*

Endorsed: Filed Jan. 31st, 1880. A. W. Potts, clerk.

Findings and Decision of Court as to Defendant, I. Dotson.

Title of Court and Cause.

This cause, above entitled, came on regularly for trial on the second day of October, 1879. The defendant, I. Dotson, having de-

manded a separate trial, a separate trial was had before the court without a jury, a trial by jury having been duly waived by the respective parties, J. D. Bicknell, Esq., appearing as attorney for plaintiff, and Will. D. Gould and James H. Blanchard, Esqs., for defendant, and, from the evidence introduced, the court finds the facts as follows, to wit:

I.

That the Rancho Sausal Redondo was granted to Antonio Ygnacio Abila May 20th, 1837, by Juan B. Alvarado, Governor *ad*
98 *interim*. A rude map accompanied the grant. June 4th, 1846, Pio Pico, constitutional governor, having recited that Abila had proven the place to belong to him, granted the same. The board of land commissioners, June 10th, 1855, confirmed the claim to the land called Sausal Redondo.

That, at its December term, 1856, the U. S. district court for the southern district of California confirmed the claim of the Rancho Sausal Redondo, and recited that the lands, of which confirmation is hereby made, are known by the name of Sausal Redondo and Guaspita, being the same lands granted by Juan B. Alvarado May 20th, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanied his original petition to the Governor for said lands, reference being had, for more particular description, to the said original grant of said lands and to the said map belonging thereto, filed in this cause and copied in said transcript, provided the lands contained in said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity, and no more, within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity; that this decree became final; that no judicial measurement had ever been made; that, at the instance of W. S. Rosecrans,
99 who paid for the survey, and who afterward applied to the State to purchase the lands in question, the Rancho Sausal Redondo was surveyed in February, 1868, by U. S. Surveyor Deputy Geo. Hansen.

That this survey did not embrace the lands in question. That the United States surveyor general attempted to extend the section and township lines over said lands, and township plats representing the survey of said land were filed in the United States district land office, at San Francisco, April 22d, 1868. That the grant owners protested against said survey of the Rancho Sausal Redondo, made February, 1868, reciting:

1st. That the owners of that claim had applied to the surveyor general for the estimate of the expenses of a survey made under the act of 1864; and

2d. That notice of the survey made February, 1868, had not been given to the parties in interest.

3d. That the segregation did not correspond with the said decree of confirmation, and demanded a survey to be made in accordance with said decree. That United States Surveyor General Upson,

May 26th, 1868, recalled the township plats of the survey of the lands in question, filed April 22d, 1868, from the United States district land office, and the same were then returned to him and another survey of said Rancho Sausal Redondo was ordered, and was made July, 1868, by U. S. Deputy Surveyor Thompson.

That the survey of said Rancho made July, 1868, embraced all of the lands in question, was duly approved by Sherman Day, United States surveyor general, April 14th, 1869, as a part of said Rancho Sausal Redondo.

That these surveys of said Rancho Sausal Redondo made respectively February and July, 1868, came up regularly on appeal before the Commissioner of the General Land Office and the Secretary of the Interior of the United States, and were passed upon by said officers.

That on the 31st day of October, 1871, the Secretary of the Interior rejected the survey of July, 1868, of said Rancho Sausal Redondo, and directed that the said township plats of the land in question be returned to the United States land office.

That so much of said township plats as included the lands in question were again suspended by the Commissioner of the General Land Office on the 18th day of March, 1872, by reason of being within the exterior limits of said rancho, and of the claim made thereto by the owners of said grant, in their contest as to the survey thereof and rights thereto; and the same was not again restored until the 15th day of June, 1872.

That the survey of February, 1878, with slight modifications, was approved by the Commissioner of the General Land Office March 22d, 1875, upon which patent issued therefor on said day.

II.

That about the 6th day of March, 1868, W. S. Rosecrans procured for his own benefit a great number of men to make applications to purchase the lands from the State of California described in plaintiff's complaint; that said applications purported to have been made under the provision of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, and none of said applications were signed by any person.

That each of said applicants conveyed by deed to one W. S. Rosecrans the lands for which he so applied; some of which deeds were made and executed immediately before, some at the time of, and others immediately after the applications were made as above. That neither the said applicants nor any one in their behalf ever paid the State of California for said applications or for the execution thereof; all expenses connected therewith being wholly borne by said Rosecrans. That the said applications and deeds were all one and the same transaction, and were wholly fraudulent and void *ab initio*, and were obtained in the behalf of said Rosecrans, who paid each applicant a sum of money therefor, and in fraud of the provisions of said act of April 27th, 1863. That

said applicants were not informed by said Rosecrans, or any other person, of the contents of said applications, and that they did not read the affidavits accompanying said applications, nor were they informed by any officers authorized to take acknowledgments, or any other person, of the contents thereof, and were not sworn to any oath or affidavits connected therewith.

That the applications of Andrew J. Bowman and Miles S. Loomis for the land described in defendant's answer was one of said fraudulent applications, and was made March 6th, 1868, for the benefit of said Rosecrans, and were fraudulent; that said applications were presented to the State locating agent, and by him accepted and filed on the — day of April, 1868.

That said applications were not accompanied by any affidavit of three disinterested persons, stating, among other things, that said applicant was a resident of the State, and that the lands were unoccupied by any person except the applicant, as required by said act of April 27th, 1863.

That each said applicants omitted and neglected to file in the office of county recorder of the county in which the lands were situated a description of the lands applied for, with a certificate of the oath or affirmation endorsed thereon, as required by the 29th section of said act of April 27th, 1863.

103 III.

That plat- including these lands, purporting to be townships, were made and filed for the first time in the U. S. land office at San Francisco, April 22d, 1868; that said plats were recalled by the U. S. surveyor general May 26th, 1863, and were never again filed in said land office.

That by reason of said applications, Leander Ransom, State locating agent of the State of California, on said 22d April, 1868, pretending to act under and by virtue of law, and in part satisfaction of the grant by the United States to said State of other lands in lieu of the 16th and 36th sections, for school purposes, under an act of Congress, approved March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," and of an act of Congress, approved July 23d, 1866, entitled "An act to quiet land titles in California," selected and located the lands described in said application for the State of California.

That the selection and location of said land was the result of and made in satisfaction of said application, and corresponded with it in number and in the description of the land applied for.

That the United States surveyor general for the State of
104 California never furnished the State authorities with a list including any of the said 16th and 36th sections, or any part thereof, used by said State locating agent in said selection and location as a basis of selection, as required by section 6 of said act of Congress, approved July 23d, 1866.

That thereafter, by reason of said application, selection, and location, to wit, on the 23d and 24th day- of November, 1871, and long

prior to the lapse of the ninety days after filing of the township plats including said lands in the U. S. district land office, the Commissioner of the U. S. General Land Office and the Secretary of the Interior inadvertently and by mistake certified — listed said lands to the State of California, and that the lists including said lands was identical with said application, selection, and location in number, description of land selected, and none of said land thus selected was of the character contemplated by any act of Congress, or intended to be granted thereby.

That on or about the 25th day of August, 1869, before said lands were legally surveyed, and when there was no township plat including said lands on file in the U. S. land office, said W. S. Rosecrans made application to the surveyor general of the State of California, John W. Bost, to purchase and locate all of said described lands in the applications mentioned in the second finding, which
105 were with them identical in description of land applied for, and the 16th and 36th sections used as a basis of said application.

That on the 27th day of August, 1869, Robert Gardiner, signing himself as the surveyor general of the State of California, accepted said application at a time long prior to his election or qualification for said office, and that said application was never accepted by any other person.

That thereafter, to wit, on the 10th day of February, 1872, Robt. Gardner, then surveyor general of the State of California, basing his approval upon the recital therein, to wit, "that the location has been made by then locating agent in the name and for the benefit of the State of California, at the Los Angeles district, in the city of Los Angeles, with the consent of list No. 1 of said district, bearing date the 24th day of November, 1871," approved each of said applications.

That thereafter, and in consequence thereof, certificates of purchase and patents issued from the State of California for said land to W. S ——.

That neither the plaintiff, M. J. O'Connor, nor said Rosecrans, nor the said Andrew J. Bowman, and nor said Miles J. Loomis, nor either of them, were ever in the actual possession of said lands or any part thereof, or ever had any improvements thereon, or ever had
106 any portion thereof fenced or enclosed in any way, and that all of said lands are rich agricultural lands, and that the plaintiff and his grantor have every year, since 1872, leased the land in controversy to persons who have used the same for grazing purposes, pasturing sheep thereon, and have so used it until defendant entered thereon.

That the plaintiff, M. J. O'Connor, bases his claim to said lands, and in no other way than by a deed to the same from W. S. Rosecrans and the above procedure herein found.

VI.

That the township plats, including said lands, were, on the 21st day of November, 1871, filed for the first time in the United States district land office at Los Angeles, California.

VII.

That at the time of making said application and selection the Rancho San Jacinto Viejo, within the exterior limits of which E. ½ and W. ½ of section 36, T. 4 S., R.—W., S. B. M., the bases of said application and selection set forth in finding second above was situated, had not been finally surveyed and located by the United States, nor were said lands at the date of said application and selection lost to the State of California as school lands by reason of any final survey of said rancho by the United States authorities.

VIII.

107 That said defendant, I. Dotson, was a duly qualified pre-emption settler, and fully entitled to the privileges of the pre-emption laws of the United States, and settled upon said tract of said land claimed by him, as above found, in good faith as such settler, and performed thereon all acts required by said pre-emption laws to entitle a person to pre-empt public land.

That on the 4th day of April, 1876, the defendant applied to the register and receiver of the U. S. district land office at Los Angeles, Cal., to file his declaratory statement in due form upon said land, as required by the laws of the United States; that at the time of making said application the defendant was living on said land with his family, and had made valuable improvements thereon; that on said 5th day of April, 1876, said defendant did tender and deposit his declaratory statement in due form with the register and receiver of the proper U. S. district land office, together with all legal fees therefor.

That afterwards, to wit, on or about the 10th day of October, said defendant made the requisite and usual proofs before the register and receiver of said U. S. district land office of his qualifications and his settlement and his improvements on said tract of land, and tendered the same in writing, and deposited the same with said register and receiver, and at the same time tendered the full
108 Government price therefor, with all legal fees and commissions, and requested that he be permitted to enter said land at said land office under said pre-emption laws; and that said register and receiver refused to approve said claim of the defendant, and refused to permit him to enter said lands under said pre-emption laws, and refused to receive the purchase price, and still so refuse.

That said defendant duly appealed from said action of the register and receiver, and that said claim is now pending before the U. S. General Land Office.

IX.

That on the — day of ——, 1879, said defendant duly applied to the proper authorities of the State of California to purchase said land from the State, and that said application is now pending and undetermined.

X.

And the court further finds that the plaintiff had no right, title, or interest in said land at the time of the commencement of this action.

As conclusions of law from the foregoing facts the court finds—

I.

That none of said lands thus included within the bound-
109 aries or exterior limits of the private grant, to wit, the Rancho Sausal Redondo, were public lands within the meaning of the acts of Congress granting lands to the State of California as school lands, or as State indemnity lands, until the 31st day of October, 1871, the date the said claim covering them was finally decided to be invalid, and all of such lands were thus excluded from any mode of acquirement. They were not in condition to be applied for or acquired by individuals or selected by the State, and that the attempt of the surveyor general to remove the reservation and to extend the public survey over said lands, and the filing of township plats, including the same in 1868, was without authority of the law and was wholly void. The evidence does not warrant the conclusion that the survey of the Rancho Sausal Redondo in 1868 was made by Deputy Hansen under the 8th section of the act of Congress, 1866; on the contrary, the evidence shows that said survey was not made under said act or by authority thereof.

II.

That the defendant is in such privity with the United States, the paramount source of title, as enables him to attack the patent issued to plaintiff's grantors by the State for the lands in controversy, and upon which plaintiff rests his title in an action at law or in equity.

110 III.

The selection of said land was void, as having been made without authority of law; and, being void, the State had no title which it could convey to plaintiff's grantor; that said land was not intended to be granted by any law of Congress, and the listing of said lands to the State by the Commissioner of the General Land Office was null and void, and the patents from the State for said lands are void, and the plaintiff has no title to said land, or any part thereof.

IV.

That an invalid State selection is no bar to the rights of a preemptor or homestead settler, and that the tender of proof and offer of payment by the defendant for said land placed him in the same relation as if the defendant had been permitted by the land office to do what in this respect was offered to be done.

Let judgment be entered accordingly as prayed by defendant.

SEPULVEDA, *Judge.*

111 *Judgment as to Defendant, I. Dotson.*

Title of Court and Cause.

This cause came on regularly for trial on the second day of October, 1879, a separate trial having been demanded by the defendant, I. Dotson, a separate trial was had, J. D. Bicknell, Esq., appearing as counsel for plaintiff; M. J. O'Connor and Will D. Gould and James H. Blanchard, Esqs., for said defendant. A trial by jury having been expressly waived by the respective parties, this cause was tried by the court without a jury; whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court files its findings and decision in writing, and orders that judgment be entered herein in favor of defendants in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that plaintiff has no title in the land; that the claim of title of plaintiff, and the patents and deeds under and by virtue of which he claims title are void, and of no effect; that said patents be cancelled; that the plaintiff be forever enjoined from asserting any title to said land claimed by
112 said defendant, I. Dotson, to wit, to the W. ½ of S. E. ¼ and E. ½ of S. W. ¼, section 26, T. 2 S., R. 14 W., S. B. M., and that the defendant have his costs and disbursements incurred in this action, amounting to the sum of $145.58.

SEPULVEDA, *Judge.*

Endorsed: Filed Feb. 3d, 1880. A. W. Potts, clerk.

Finding and Decision of Court as to Defendant, —— ——.

Title of Court and Cause.

This cause above entitled came on regularly for trial on the second day of October, 1879. The defendant, W. T. Somes, having demanded a separate trial, a separate trial was had before the court without a jury, a trial by jury having been duly waived by the respective parties, J. D. Bicknell, Esq., appearing as attorney for plaintiff, and Will D. Gould and James H. Blanchard, Esqs., for defendant, and, from the evidence introduced, the court finds the facts as follows:

I.

That the Rancho Sausal Redondo was granted to Antonio Ygnacio Abila May 20th, 1837, by Juan B. Alvarado, governor *ad*
113 *interim.* A rude map accompanied the grant. June 4th, 1846, Pio Pico, constitutional governor, having recited that Abila had proven the place to belong to him, granted the same. The board of land commissioners, June 10th, 1855, confirmed the claim to the land called Sausal Redondo.

That at its December term, 1856, the U. S. district court for the

southern district of California confirmed the claim of the Rancho Sausal Redondo, and recited that the lands, of which confirmation is hereby made, are known by the name of Sausal Redondo and Guaspita, being the same lands granted by Juan B Alvarado, May 20th, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanied his original petition to the governor for said lands, reference being had for more particular description to the said original grant of said lands, and the said map belonging thereto filed in this cause and copied in said transcript, provided the lands contained in said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity and no more within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity. That this decree became final. That no judicial measurement had ever been made. That at the instance of W. S. Rosecrans,
114 who paid for the survey, and afterward applied to the State to purchase the lands in question, the Rancho Sausal Redondo was surveyed in February, 1868, by U. S. Surveyor Deputy Geo. Hansen.

That this survey did not embrace the lands in question. That the United States surveyor general attempted to extend the section and township lines over said lands, and township plats representing the survey of said land were filed in the United States district land office at San Francisco, April 22d, 1868. That the grant owners protested against said survey of the Rancho Sausal Redondo, made February, 1868, reciting—

1st. That the owners of that claim had applied to the surveyor-general for the estimate of the expenses of a survey made under the act of 1864; and

2d. That notice of the survey, made February, 1868, had not been given to the parties in interest.

3d. That the segregation did not correspond with the said decree of confirmation, and demanded a survey to be made in accordance with said decree. That United States Surveyor General Upson, May 26th, 1868, recalled the township plats of the survey of the lands in question, filed April 22d, 1868, from the United States district land office, and the same were then returned to him,
115 and another survey of said Rancho Sausal Redondo was ordered, and was made July, 1868, by U. S. Deputy Surveyor Thompson.

That the survey of said rancho made July, 1868, embraced all of the lands in question, and was duly approved by Sherman Day, United States surveyor general, April 14th, 1869, as a part of said Rancho Sausal Redondo.

That these surveys of said Rancho Sausal Redondo made, respectively, February and July, 1868, came up regularly on appeal before the Commissioner of the General Land Office and the Secretary of the Interior of the United States, and were passed upon by said officers.

That on the 31st day of October, 1871, the Secretary of the Inte-

rior rejected the survey of July, 1868, of said Rancho Sausal Redondo, and directed that the said township plats of the land in question be returned to the United States Land Office.

That so much of said township plats as included the lands in question were again suspended by the Commissioner of the General Land Office on the 18th day of March, 1872, by reason of being within the exterior limits of said rancho and of the claim made thereto by the owners of said grant in their contest as to the survey thereof and rights thereto, and the same was not again restored until the 15th day of June, 1872.

116 That the survey of February, 1868, with slight modifications, was approved by the Commissioner of the General Land Office, March 22d, 1875, upon which patents issued therefor on said day.

II.

That about the — day of March, 1868, W. S. Rosecrans procured for his own benefit a great number of men to make application to purchase the lands from the State of California described in plaintiff's complaint; that said applications purported to have been made under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, and none of said applications were signed by any person.

That each of said applicants conveyed by deed to one W. S. Rosecrans the lands for which he so applied; some of which deeds were made and executed immediately before, some at the time of, and others immediately after the applications were made as above. That neither the said applicants nor any one in their behalf ever paid the State of California for said applications or for the execution thereof; all expenses connected therewith being wholly borne by said Rosecrans. That said applications and deeds were all one and the same transaction, and were wholly fraudulent and void *ab initio*, and were obtained in the behalf of said Rosecrans, who paid

117 each applicant a sum of money therefor, and in fraud of the provisions of said act of April 27th, 1863. That said applicants were not informed by said Rosecrans or any other person of the contents of said applications, and that they did not read the affidavits accompanying said applications, nor were they informed by any officers authorized to take acknowledgments, or any other person, of the contents thereof, and were not sworn to any oath or affidavits connected therewith.

That the application of ——— for the land described in defendant's answer was one of said fraudulent applications, and was made March 6th, 1868, for the benefit of said Rosecrans, and was fraudulent; that said application was presented to the State locating agent, and by him accepted and filed on the 20th day of April, 1868.

That said application was not accompanied by an affidavit of three disinterested persons, stating, among other things, that said applicant was a resident of the State, and that the lands were unoccupied by any person except the applicant, as required by said act of April 27th, 1863.

That said applicant omitted and neglected to file in the office of county recorder of the county in which the lands were situated a description of the lands applied for, with a certificate of the oath or affirmation endorsed thereon, as required by the 29th section of said act of April 27th, 1863.

118 III.

That the plats including these lands, purporting to be townships, were made and filed for the first time in the U. S. land office of the State of California on said ——, 1878, pretending to act under and by virtue of law and in part satisfaction of the grant by the United States to said State of other lands in lieu of the 16th and 36th sections for school purposes, under an act of Congress approved March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," and of an act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in California," selected and located the lands described in said application for the State of California.

That the selection and location of said land was the result of and made in satisfaction of said application, and corresponded with it in number and in the description of the land applied for.

That the United States surveyor general for the State of
119 California never furnished the State authorities with a list including any of the said 16th and 36th sections, or any part thereof, used by said State locating agent in said selection and location as a basis of selection, as required by section 6 of said act of Congress approved July 23d, 1866.

That thereafter, by reason of said application, selection, and location, to wit, on the 23d and 24th day of November, 1871, and long prior to the lapse of the ninety days after filing of the township plats including said lands in the U. S. district land office, the Commissioner of the U. S. Land Office and the Secretary of the Interior inadvertently and by mistake certified and listed said lands to the State of California, and that the lists including said lands was identical with said application, selection, and location in number, description of land selected, and none of said land thus selected was of the character contemplated by any act of Congress, or intended to be granted thereby.

That on or about the 25th day of August, 1869, before said lands were legally surveyed, and when there was no township plat including said lands on file in the U. S. Land Office, said W. S. Rosecrans made application to the surveyor general of the State of California, John W. Bost, to purchase and locate all of said described lands in
120 the application mentioned in the second findings, which were with them identical in description of land applied for and the 16th and 36th sections used as a basis of said application.

That on the 27th day of August, 1869, Robert Gardiner, signing himself as the surveyor general of the State of California, accepted said application at a time long prior to his election or qualification

for said office, and that said application was never accepted by any other person.

That thereafter, to wit, on the 10th day of February, 1872, Rob't Gardner, then surveyor general of the State of California, basing his approval upon the recital therein, to wit, "that the location has been made by the locating agent in the name and for the benefit of the State of California, at the Los Angeles district, in the city of Los Angeles, with the consent of list No. 1 of said district, bearing date the 24th day of November, 1871," approved each of said applications.

That thereafter and in consequence thereof certificates of purchase land patents issued from the State of California for said land to W. S. Rosecrans.

That neither the plaintiff, M. J. O'Connor, nor said Rosecrans, nor the said ———, nor either of them, were ever in the actual possession of said lands or any part thereof, or ever had any im-
121 provements theron, or ever had any portion thereof fenced or enclosed in any way, and that all of said lands are rich agricultural lands, and that the plaintiff and his grantor have every year since 1872 leased the land in controversy to persons who have used the same for grazing purposes, pasturing sheep thereon, and have so used it until defendant entered thereon.

That the plaintiff, M. J. O'Connor, bases his claim to said lands, and in no other way than by a deed to the same from W. S. Rosecrans and the above procedure herein found.

VI.

That the township plats, including said lands, were, on the 21st day of November, 1871, filed for the first time in the United States district land office at Los Angeles, California.

VII.

That at the time of making said application and selection the Rancho Sausál Redondo, within the exterior limits of which W. ½ of section 16, T. 2 S., R. 14 W., S. B. M., the bases of said application and selection set forth in finding second above was situated, had not been finally surveyed and located by the United States, nor were said lands at the date of said application and selection lost to the State of California as school lands by reason of any final survey of said rancho by the United States authorities.

122 VIII.

That said defendant, W. T. Somes, was a duly qualified pre-emption settler, and fully entitled to the privileges of the pre-emption law of the United States, and settled upon said tract of said claim by him, as above found, in good faith as such settler, and performed all acts required by said pre-emption laws to entitle a person to pre-empt public land.

That on the 4th day of April, 1876, the defendant applied to the register and receiver of the U. S. district land office at Los Angeles, Cal., to file his declaratory statement in due form upon said land,

as required by the laws of the United States. That at the time of making said application the defendant was living on said land with his family and had made valuable improvements thereon. That on said 4th day of April, 1876, said defendant did tender and deposit his declaratory statement in due form with the register and receiver of the proper U. S. district land office, together with all legal fees therefor.

That afterwards, to wit, on or about the 10th day of December, 1876, said defendant made the requisite and usual proofs before the register and receiver of said U. S. district land office of his qualifications and his settlement and his improvements on said
123 tract of land, and tendered the same in writing and deposited the same with said register and receiver, and at the same time tendered the full Government price therefor, with all legal fees and commissions, and requested that he be permitted to enter said land at the said land office under said pre-emption laws, and that said register and receiver refused to approve said claim of the defendant and refused to permit him to enter said lands under said pre-emption laws and refused to receive the purchase price, and still so refuse.

That said defendant duly appealed from said action of the register and receiver, and that said claim is now pending before the U. S. General Land Office.

IX.

And the court further finds that the plaintiff had no right, title, or interest in said land at the time of the commencement of this action:

As conclusions of law from the foregoing facts the court finds:

I.

That none of said lands thus included within the boundaries or exterior limits of the private grant, to wit, the Rancho Sausal Redondo were public lands within the meaning of the act of
124 Congress granting lands to the State of California as school lands or as State indemnity lands, until the 31st day of October, 1871, the date the said claim covering them was finally decided to be invalid, and all of such lands were thus excluded from any mode of acquirement. They were not in condition to be applied for or acquired by individuals or selected by the State, and that the attempt of the surveyor general to remove the reservation and to extend the public survey over said land, and the filing of township plats, including the same, in 1868, was without authority of the law and was wholly void. The evidence does not warrant the conclusion that the survey of the Rancho Sausal Redondo in 1868 was made by Deputy Hansen under the 8th section of the act of Congress, 1866; on the contrary, the evidence shows that said survey was not made under said act or by authority thereof.

II.

That the defendant is in such privity with the United States, the paramount source of title, as enables him to attack the patent issued to plaintiff's grantors by the State for the lands in controversy and upon which plaintiff rests his title in an action at law or equity.

III.

The selection of said land was void as having been made
125 without authority of law, and being void the State had no title which it could convey to plaintiff's grantor; that said land was not intended to be granted by any law of Congress, and the listing of said land to the State by the Commissioner of the General Land Office was null and void, and the patents from the State for said lands are void, and the plaintiff has no title to said land nor any part thereof.

IV.

That an invalid State selection is no bar to the rights of a pre-emptor or homestead settler, and that the tender of proof and offer of payment by the defendant for said land, placed him in the same relation as if the defendant had been permitted by the land office to do what in this respect was offered to be done.

Let judgment be entered accordingly as prayed by defendant.

SEPULVEDA, *Judge.*

126 *Judgment as to Defendant, W. T. Somes.*

Title of Court and Cause.

This cause came on regularly for trial on the second day of October, 1879, a separate trial having been demanded by the defendant, W. T. Somes, a separate trial was had, J. D. Bicknell, Esq., appearing as counsel for plaintiff, M. J. O'Connor, and Will D. Gould and James H. Blanchard for said defendant. A trial by jury having been expressly waived by respective parties, this cause was tried by the court without a jury, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and decision in wrlting, and orders that judgment be entered herein in favor of defendants in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that plaintiff has no title in the land; that the claim of title of plaintiff and the patents and deeds under and by virtue of which he claims title are void and of no effect; that said patents be cancelled; that the plaintiff be forever enjoined from asserting any title to said land claimed by
127 said defendant, W. T. Somes, to wit, to the N E ¼ of section 27, T. 2 S., R. 14 W., San Bernardino base and meridian, and

that the defendant have his costs and disbursements incurred in this action, amounting to the sum of $144.08.

SEPULVEDA, *Judge.*

Endorsed: Filed Feb. 9th, 1880.

Findings and Decision of Court as to Defendant, H. McClain.

Title of Court and Cause.

This cause above entitled came on regularly for trial on the second day of October, 1879. The defendant, H. McClain, having demanded a separate trial, a separate trial was had before the court without a jury, a trial by jury having been duly waived by the respective parties, J. D. Bicknell, Esq., appearing as attorney for plaintiff and H. T. Hazard for defendant, and from the evidence introduced the court finds the facts as follows:

I.

That the Rancho Sausal Redondo was granted to Antonio Ygnacio Abila May 20th, 1837, by Juan B. Alvarado, governor *ad in-*
128 *terim.* A rude map accompanied the grant. June 4th, 1846, Pio Pico, constitutional governor, having recited that Abila had proven the place to belong to him, granted the same. The board of land commissioners, June 10th, 1855, confirmed the claim to the land called Sausal Redondo.

That at its December term, 1856, the U. S. district court for the southern district of California confirmed the claim of the Rancho Sausal Redondo, and recited that the lands of which confirmation is hereby made are known by the name of Sausal Redondo and Guaspita, being the same lands granted by Juan B. Alvarado May 20th, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanied his original petition to the Governor for said lands, reference being had for more particular description to the said original grant of said lands, and the said map belonging thereto, filed in this cause and copied in said transcript, provided the lands contained in said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity, and no more, within said boundaries: but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity. That this decree became final. That no judicial measurement had ever been made. That, at the instance of W. S. Rosecrans, who
129 paid for the survey and who afterward applied to the State to purchase the lands in question, the Rancho Sausal Redondo was surveyed in February, 1868, by U. S. Surveyor Deputy Geo. Hansen.

That this survey did not embrace the lands in question. That the United States surveyor general attempted to extend the section and township lines over said lands, and township plats representing the survey of said land were filed in the United States district land office at San Francisco April 22d, 1868. That the grant owners pro-

tested against said survey of the Rancho Sausal Redondo made February, 1868, reciting—

1st. That the owners of that claim had applied to the surveyor general for the estimate of the expenses of a survey made under the act of 1864; and,

2d. That notice of the survey made February, 1868, had not been given to the parties in interest.

3d. That the segregation did not correspond with the said decree of confirmation, and demanded a survey to be made in accordance with said decree. That United States Surveyor General Upson, May 26th, 1868, recalled the township plats of the survey of the lands in question, filed April 22d, 1868, from the United States district land office, and the same were then returned to him, and another
130 survey of said Rancho Sausal Redondo was ordered, and was made July, 1868, by U. S. Deputy Surveyor Thompson.

That the survey of said rancho made July, 1868, embraced all of the lands in question, and was duly approved by Sherman Day, United States surveyor general, April 14th, 1869, as a part of said Rancho Sausal Redondo.

That these surveys of said Rancho Sausal Redondo made respectively February and July, 1868, came up regularly on appeal before the Commissioner of the General Land Office and the Secretary of the Interior of the United States, and were passed upon by said officers.

That on the 31st day of October, 1871, the Secretary of the Interior rejected the survey of July, 1868, of said Rancho Sausal Redondo, and directed that the said township plats of the land in question be retured to the United States Land Office.

That so much of said township plats as included the lands in question were again suspended by the Commissioner of the General Land Office on the 18th day of March, 1872, by reason of being within the exterior limits of said rancho and of the claim made thereto by the owners of said grant, in their contest as to the survey thereof and rights thereto; and the same was not again restored until the 15th day of June, 1872.

131 That the survey of February, 1868, with slight modifications, was approved by the Commissioner of the General Land Office, March 22d, 1875, upon which patent issued therefor on said day.

II.

That about the — day of March, 1868, W. S. Rosecrans procured for his own benefit a great number of men to make application to purchase the lands from the State of California described in plaintiff's complaint; that said applications purported to have been made under the provision of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, and none of said applications were signed by any person.

That each of said applicants conveyed by deed to one W. S. Rosecrans the lands for which he so applied; some of which deeds were made and executed immediately before, some at the time of, and

others immediately after the applications were made as above. That neither the said applicants nor any one in their behalf ever paid the State of California for said applications or for the execution thereof; all expenses connected therewith being wholly borne by said Rosecrans. That the said applications and deeds were all one and the same transaction, and were wholly fraudulent and void *ab initio*, and were obtained in the behalf of said Rosecrans, who paid each
132 applicant a sum of money therefor, and in fraud of the provisions of said act of April 27th, 1863. That said applicants were not informed by said Rosecrans or any other person, of the contents of said applications, and that they did not read the affidavits accompanying said applications, nor were they informed by any officers authorized to take acknowledgments, or any other person, of the contents thereof, and were not sworn to any oath or affidavits connected therewith.

That the application of Miles S. Loomis for the land described in defendant's answer was one of said fraudulent applications, and was made March 6th, 1868, for the benefit of said Rosecrans, and was fraudulent; that said application was presented to the State locating agent, and by him accepted and filed on the 20th day of April, 1868.

That said application was not accompanied by an affidavit of three disinterested persons, stating, among other things, that said applicant was a resident of the State, and that the lands were unoccupied by any person except the applicant, as required by said act of April 27th, 1863.

That said applicant omitted and neglected to file in the office of county recorder of the county in which the lands were situated a description of the lands applied for, with a certificate of the oath or affirmation endorsed thereon, as required by the 29th section of said act of April 27th, 1863.

133 III.

That the plats including these lands, purporting to be township plats, were made and filed for the first time in the U. S. land office at San Francisco April 22d, 1868; that said plats were recalled by the U. S. surveyor general May 26th, 1863, and were never again filed in said land office.

That by reason of said applications Leander Ransom, State locating agent of the State of California, on said ——, 1868, pretending to act under and by virtue of law, and in part satisfaction of the grant by the United States to said State of other lands in lieu of the 16th and 36th sections for school purposes, under an act of Congress approved March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," and of an act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in California," selected and located the lands described in said application for the State of California.

That the selection and location of said land was the result of and made in satisfaction of said application, and corresponded with it in number and in the description of the land applied for.

That the United States surveyor general for the State of
134 California never furnished the State authorities with a list including any of the said 16th and 36th sections, or any part thereof, used by said State locating agent in said selection and location as a basis of selection, as required by section 6 of said act of Congress approved July 23d, 1866.

That thereafter, by reason of said application, selection, and location, to wit, on the 23d and 24th day of November, 1871, and long prior to the lapse of the ninety days after filing of the township plats, including said lands in the U. S. district land office, the Commissioner of the U. S. General Land Office and the Secretary of the Interior inadvertently and by mistake certified and listed said lands to the State of California, and that the lists including said lands was identical with said application, selection, and location in number, description of land selected, and none of said land thus selected was of the character contemplated by any act of Congress, or intended to be granted thereby.

That on or about the 25th day of August, 1869, before said lands were legally surveyed and when there was no township plat including said lands on file in the U. S. land office, said W. S. Rosecrans made application to the surveyor general of the State of California, John W. Bost, to purchase and locate all of said described lands in
the applications mentioned in the second finding, which were
135 with them identical in description of land applied for, and the 16th and 36th sections used as a basis of said application.

That on the 27th day of August, 1869, Robert Gardiner, signing himself as the surveyor general of the State of California, accepted said application at a time long prior to his election or qualification for said office, and that said application was never accepted by any other person.

That thereafter, to wit, on the 10th day of February, 1872, Robt. Gardner, then surveyor general of the State of California, basing his approval upon the recital therein, to wit, "that the location has been made by the locating agent in the name and for the benefit of the State of California, at the Los Angeles district, in the city of Los Angeles, with the consent of list No. 1 of said district, bearing date the 24th day of November, 1871," approved each of said applications.

That thereafter and in consequence thereof, certificates of purchase and patents issued from the State of California for said land to W. S. Rosecrans.

That neither the plaintiff, M. J. O'Connor, nor said Rosecrans, nor the said Miles S. Loomis, nor either of them, were ever in the actual
possession of said lands or any part thereof, or ever had any
136 improvements thereon, or ever had any portion thereof fenced or enclosed in any way, and that all of said lands are rich agricultural lands, and that the plaintiff and his grantor have every year since 1872 leased the land in controversy to persons who have used the same for grazing purposes, pasturing sheep thereon, and have so used it until defendant entered thereon.

That the plaintiff, M. J. O'Connor, bases his claim to said lands,

and in no other way than by a deed to the same from W. S. Rosecrans and the above procedure herein found.

VI.

That the township plats, including said lands, were on the 21st day of November, 1871, filed for the first time in the United States district land office at Los Angeles, California.

VII.

That at the time of making said application and selection the Rancho San Jacinto Viejo, within the exterior limits of which section 36, T. 4 S., R. 1 W., S. B. M., the bases of said application and selection set forth in finding second above was situated, had not been finally surveyed and located by the United States, nor were said lands at the date of said application and selection lost to the State of California as school lands by reason of any final survey of said rancho by the United States authorities.

137 VIII.

That said defendant, H. McClain, was a duly qualified pre-emption settler, and fully entitled to the privileges of the pre-emption law of the United States, and settled upon said tract of land claimed by him, as above found, in good faith as such settler, and performed thereon all acts required by said pre-emption laws to entitle a person to pre-empt public land.

That on the — day of ——, 1876, the defendant applied to the register and receiver of the U. S. district land office, at Los Angeles, Cal., to file his declaratory statement in due form upon said land, as required by the laws of the United States. That, at the time of making said application, the defendant was living on said land with his family, and had made valuable improvements thereon. That on said — day of ——, 1876, said defendant did tender and deposit his declaratory statement in due form with the register and receiver of the proper U. S. district land office, together with all legal fees therefor.

That afterwards, to wit, on or about the — day of ——, ——, said defendant made the requisite and usual proofs before the register and receiver of said U. S. district land office of his qualifica-
138 tions and his settlement, and his improvements on said tract of land, and tendered the same in writing and deposited the same with said register and receiver, and at the same time tendered the full Government price therefor, with all legal fees and commissions, and requested that he be permitted to enter said land at said land office under said pre-emption laws, and that said register and receiver refused to approve said claim of the defendant and refused to permit him to enter said lands under said pre-emption laws, and refused to receive the purchase price, and still so refuse.

That said defendant duly appealed from said action of the register

and receiver, and that said claim is now pending before the U. S. General Land Office.

IX.

And the court further finds that the plaintiff had no right, title, or interest in said land at the time of the commencement of this action.

As conclusions of law from the foregoing facts the court finds:

I.

That none of said lands thus included within the boundaries or exterior limits of the private grant, to wit, the Rancho Sausal Redondo,
were public lands within the meaning of the act of Congress
139 granting lands to the State of California, as school lands or as State indemnity lands, until the 31st day of October, 1871, the date the said claim covering them was finally decided to be invalid and all of such lands were thus excluded from any mode of acquirement. They were not in condition to be applied for or acquired by individuals or selected by the State, and that the attempt of the surveyor general to remove the reservation and to extend the public survey over said land, and the filing of township plats, including the same in 1868, was without authority of law, and was wholly void. The evidence does not warrant the conclusion that the survey of the Rancho Sausal Redondo in 1868 was made by Deputy Hansen under the 8th section of the act of Congress, 1866; on the contrary, the evidence shows that said survey was not made under said act or by authority thereof.

II.

That the defendant is in such privity with the United States, the paramount source of title, as enables him to attack the patent issued to plaintiff's grantors by the State for the lands in controversy, and upon which plaintiff rests his title in an action at law or in equity.

III.

The selection of said land was void, as having been made
140 without authority at law, and, being void, the State had no title which it could convey to plaintiff's grantor; that said land was not intended to be granted by any law of Congress, and the listing of said land to the State by the Commissioner of the General Land Office was null and void, and the patents from the State for said lands are void, and the plaintiff has no title to said land nor any part thereof.

IV.

That an invalid State selection is no bar to the rights of a preemptor or homestead settler, and that the tender of proof and offer of payment by the defendant for said land, placed him in the same relation as if the defendant had been permitted by the land office to do what in this respect was offered to be done.

Let judgment be entered accordingly as prayed by defendant.

SEPULVEDA, *Judge.*

Judgment as to Defendant H. McClain.

Title of Court and Cause.

This cause came on regularly for trial on the 4th day of November, 1879, a separate trial having been demanded by the defendant, H. McClain, a separate trial was had; J. D. Bicknell, Esq.,
141 appearing as counsel for plaintiff, M. J. O'Connor and H. T. Hazard for said defendant, H. McClain. A trial by jury having been expressly waived by respective parties, this cause was tried by the court without a jury; whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and decision in writing, and orders that judgment be entered herein in favor of defendants in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that plaintiff has no title to the land; that the claim of title of plaintiff and the patents and deeds under and by virtue of which he claims title are void and of no effect; that said patents be cancelled; that the plaintiff be forever enjoined from asserting any title to said land claimed by said defendant, ——, to wit, to the NE. ¼ of section 26, T. 2 S., R. 14 W., San Bernardino base and meridian; and that the defendant have his costs and disbursements incurred in this action, amounting to the sum of $17.00.

January 8th, 1880.

SEPULVEDA, *Judge.*

Endorsed: Filed Jan. 8th, 1880.

142 *Statement on Motion for a New Trial.*

Title of Court and Cause.

Be it remembered that this cause came on regularly for trial on the 2d day of October, 1879, before the court, a jury having been waived by the parties.

The court proceeded to hear and determine the issues made by the pleadings, as to the defendant Frasher, who claims the S. ½ of SW. ¼, sec. 23, T. 2 S., R. 14 W., S. B. M.

Whereupon the plaintiff, to sustain the issues on his part, introduced in evidence list No. —, of the records of the United States Land Office. Said list being certified by the Commissioner of the General Land Office, under date of May 29th, 1872, and Secretary of the Interior under date of May 31st, 1872; a copy of which list, so far as it relates to the land in controversy, is hereto attached and marked Exhibit No. 1.

Plaintiff then introduced in evidence a patent from the State of California to Robert Thompson, said patent being in the usual form of patents, dated April 21st, 1874, whereby the State of California purported to convey the lands in controversy with other lands to Robert Thompson.

Plaintiff then introduced in evidence a deed, executed by Robert Thompson, dated April 21st, 1868, purporting to convey the land in controversy to W. S. Rosecrans.

143 Plaintiff then introduced in evidence a deed, executed by W. S. Rosecrans, dated April 12th, 1875, purporting to convey the land in controversy with other lands to M. J. O'Connor, the plaintiff.

Plaintiff then offered in evidence to township plat or map of T. 2 S., R. 14 W., S. B. M., which includes the land in controversy, the same being records of the U. S. district land office, with all the marginal entries thereon, purporting to show that the said township was surveyed by authority of the U. S., and section lines run in February, 1868. Survey approved by U. S. Surveyor General, March 31st, 1868, and said township plat filed in U. S. land office at San Francisco, April 22d, 1868, and filed in the U. S. land office at Los Angeles, November 21st, 1871.

Plaintiff also introduced in evidence the records of the U. S. district land office, to wit, the tract book; the entries therein relating to the land in controversy, purporting to show that said land was covered by a State selection, dated May 21st, 1868, and that said selection was approved and the land listed to State of California, May 31st, 1872.

J. D. Bicknell was sworn as a witness on behalf of plaintiff, and testified that he had been the attorney and agent of plaintiff since date of deed to plaintiff by Rosecrans, and the agent of Rose-

144 crans since sometimes in the fall of 1872. That as such agent he had for said Rosecrans and for plaintiff rented the lands in controversy, with other lands, to various parties, who have used the land for grazing purposes, herding sheep thereon continuously since the fall of 1872 up to the time the defendant entered thereon in April, 1876; that the rent of said land for grazing purposes is reasonably worth 35 cents per acre per annum; that after the entry of defendant on said lands, and before the commencement of this action, the party to whom the land was rented surrendered his lease in writing and delivered the possession of said land, so far as said lease is concerned, to the plaintiff herein.

Whereupon plaintiff rested his case, as far as the same relates to the defendant Frasher.

The defendant, Geo. W. Frasher, to sustain the issues on his part, offered in evidence a copy of an order of the U. S. surveyor general to the register and receiver of the United States land office, San Francisco, dated June 26th, 1868, ordering the return to the U. S. surveyor general office of the township plat.

To the introduction of which counsel for plaintiff objected on the grounds that the same was irrelevant, immaterial, and incompetent.

145 Upon evidence being introduced that the signature of Wm. R. Wheaton attached to the certificate was genuine, and that said Wheaton was register of said land office at the time of the signature, the court overruled the objections made and said document

was admitted as evidence; to which ruling counsel for plaintiff then and there excepted.

Said document being in words and figures following:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL., *June* 26, 1868.

J. W. SHANKLIN, Esq., *Register U. S. Land Office, San Francisco.*

SIR: You are respectfully requested to return to this office the plats of township 2 S. and 3 S., ranges 13 and 14 W., San Bernardino meridian, filed in your office April 22d, 1868.

Very respectfully, your obedient servant,

L. UPSON,
U. S. Surveyor Gen.

(Endorsed:) Filed May 28, 1868, and maps returned to surveyor general's office.

The foregoing is certified to be a correct copy of the original letter, with endorsements thereon, on file in the U. S. land office, San Francisco, Feb. 6th, 1877, said certificate being signed Wm. R. Wheaton, register.

146 Defendant then offered in evidence the township plat heretofore offered by plaintiff.

Counsel for defendant then called H. C. AUSTIN as a witness, who, being duly sworn, testified substantially as follows:

Have resided in Los Angeles near eight years; was register of U. S. land office at Los Angeles from July, 1869 until June, 1872, and am acquainted with the lands known as the Sausal Redondo, south of the city.

Counsel for defendant asked the witness the following question:

Q. Do you know how far east the owners of that grant claimed, and how far north? If so, state.

To which question counsel for plaintiff objected, on the ground that the same was irrelevant and immaterial; which objection was by the court overruled, and witness permitted to answer the question; to which ruling counsel for the plaintiff then and there in due form of law excepted.

Witness answered: There was a claim pending in the land office during my term, for all the lands, I think, west of the Tejauta and south of the city lands of Los Angeles, under the seventh

147 section of the act of July 23d, 1866, as to lands excluded from the final survey of the lines of the Sausal Redondo rancho.

Counsel for the plaintiff moved to strike out the answer of the witness, on the ground that the record of the land office would be the best evidence; which motion was by the court denied. To which ruling counsel for the plaintiff then and there in due form of law excepted.

Counsel for defendant then asked the witness the following question:

Q. State, if you know other than you have stated, of your own knowledge, that the owners of that grant actually laid claim to the lands you have described until 1871 or 1875?

Counsel for the plaintiff objected to the question, on the ground that the same was irrelevant and immaterial; which objection was by the court overruled, and witness permitted to answer the question. To which ruling counsel for plaintiff then and there excepted.

Witness answered: I knew from their claim having been filed in the land office during my term, and from personal conversation during my term of office, that they made such a claim. I also knew that I acted officially upon that claim; that I took the testimony in regard to it, and made the decision in the case in 1872.

148 Witness further testified that neither of the township plats referred to in the order of L. Upson were in the land office at Los Angeles when I assumed the duties of said office. I did not know where they were. I received them Nov. 21, 1871, from the surveyor general's office, San Francisco; I think between 1868 and 1871 the land district was divided; the lower portion of the State was made into a new district; it is a fact that in May, 1869, by executive order, the Los Angeles district, which had for some three or four years previous been consolidated with the San Francisco district, was re-established; the order was made in May, 1869, and I was appointed register in June, 1869, and as a part of my duties I was ordered to proceed to San Francisco land office and take possession of all the maps, books, and records pertaining to the Los Angeles land district. I did so, and upon receiving all the records from that office in about the middle of September, 1869, these plats were not among them, and were not received until November 1st, 1871. There was a letter transmitted with this map, as follows:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *Nov. 15th*, 1871.

H. C. AUSTIN, Esq., *Register U. S. L. O.*

SIR: In compliance with the order of Hon. Willis Drum-
149 mond, Commissioner General Land Office, dated Nov. 6th inst., I transmit herewith, for filing in your office, township plat of township 3 S., R. 13 W., S. B. M.; township 3 S., R. 14 W., S. B. M.; township 2 S., R. 13 W., S. B. M.; township 2 S., R. 14 W., S. B. M., said plat having been restored by order of the department.

I. R. HARDENBERGER,
U. S. Sur. Gen. Cal.

Defendant then offered in evidence the patent of the Rancho Sausal Redondo, with map attached thereto with endorsements thereon, for

the purpose of showing the existence of the grant and the date of the final survey.

To the admission of which counsel for the plaintiff objected, on the grounds that the same was irrelevant and immaterial; which objection was, by the court, overruled, and said patent and map admitted as evidence for the purpose offered, and to show what land was included in the patent; to which ruling counsel for plaintiffs then and there excepted. Said patent and map were then received as evidence. Said patent is in usual form, and recites that the Rancho Sausal Redondo was finally confirmed to Antonio Y. Abila, was surveyed and segregated from the adjoining public lands under instructions from the U. S. surveyor general, by Geo. Hanson, deputy U. S. surveyor, in 1868, which survey was finally ap-
150 proved by the Commissioner of the General Land Office, March 22d, 1875, and the patent issued the same day. No part of the land in controversy is included within said patent. A copy of the map of said patent is hereto attached and marked Exhibit A.

Defendant then offered in evidence a certified copy of map of U. S. Deputy Thompson's survey of Rancho Sausal Redondo, made in July, 1868, which includes the lands patented in said rancho and the lands in controversy with all the certificates and endorsements thereon, and the certificate thereon in the words and figures as follows, to wit:

"The field-notes of the Rancho Sausal Redondo finally confirmed to Antonio Ygnacio Abila, from which this plat has been made, have been examined and approved, and are on file in this office.

San Francisco, California, April 14th, 1869.

SHERMAN DAY,
U. S. Sur. Gen., Cal."

To the introduction of which the plaintiff objected, upon the grounds that the same was irrelevant and immaterial, and upon the further ground that defendant having introduced the patent and map attached thereto of the Sausal Redondo Rancho, the same is conclusive as to the boundaries of said grant. All of which objections were, by the court overruled, and the same admitted as
151 evidence; to which ruling plaintiff then and there excepted. A copy of which said map with certificates and endorsements thereon is hereto attached and marked Exhibit B.

Defendant then offered in evidence decision of the Secretary of the Interior of the U. S., dated August 31st, 1871, in regard to the survey of the Rancho Sausal Redondo, to show that the large survey (Thomson) of said ranch, which includes the land in controversy, was not rejected until October, 1871. Also offered in evidence, as a part of the same decision, the order of the Commissioner and opinion of the Attorney General attached thereto.

To the introduction of which the plaintiff objected, upon the grounds that the same is irrelevant and immaterial and incompetent for any purpose, as a matter of evidence, as it appears upon the face of the same that it is only an opinion of the Attorney General

and Secretary upon question of law. The court overruled the objections, and admitted the same as evidence—not of the legal opinion of the officers, but as evidence of the facts contained therein, and the fact that that opinion was given at that time so as to throw light upon the subject-matter in litigation. To which ruling plaintiff then and there excepted in due form of law, and said documents were then admitted as evidence, and are as follows:

152 DEPARTMENT OF JUSTICE,
OFFICE OF ASSISTANT ATTORNEY GENERAL,
WASHINGTON, *October* 23, 1871.

SIR: I have considered the appeal case commonly called Sausal Redondo. The facts are as follows:

On the 20th of May, 1837, Juan B. Alvarado, who styles himself "governor *ad interim* of the free and sovereign State of Alta-California," in answer to the petition of Antonio Ignacio Abila for the land known as Sausal Redondo, granted him the said tract of land, in accordance with the resolution of the most excellent deputation erected into a Congress, which resolution is as follows:

"There are conceded to the citizen Antonio Ignacio Abila the places of Sausal Redondo and Guaspita, which he at present occupies with his stock, without prejudice to the pasturage of the cattle and horses of the community of the city, since the corresponding ejidos are not yet marked out.

"2d. That if the land referred to in the foregoing proposition should be included within the ejidos, the grantee will be subject to the payment of the corresponding tax."

"Santa Barbara, May 14th, 1837."

153 A rude map accompanies the grant, and the land is spoken of by Governor Alvarado as being within the boundaries laid down on this map.

On the 4th of June, 1846, Pio Pico, "constitutional governor of the Department of the Californias," after reciting that Antonio Ignacio Abila had proven to belong to him the place known as Sentinella, Guaspita, Salinas and Sausal Redondo, between the boundaries of Los Palos Verdes, Gutierres, Los Cuerbos, La Cienega, La Ballona, and the seashore, of the extent of four square leagues, a little more or less, grants him the said land under these conditions:

1st. He is to enclose it, use and cultivate it.

2d. He is to ask the judge to give him juridical possession, mark the boundaries and place the necessary monuments.

3d. The land is in extent four square leagues, a little more or less.

It is not likely that any juridical possession was ever given, as no record of it is found, and the grant was made after the war began between the United States and Mexico.

The board of land commissioners, 19th June, 1855, confirmed Abila's claim to the land "called Sausal Redondo, containing five square leagues."

154 The United States district court for the southern district of California, at its December term, 1856, confirmed the decision

of the board of land commissioners, and afterwards recited that the lands of which confirmation are hereby made, known by the name of Sausal Redondo and Guaspita, being the same lands granted by Juan Alvarado, May 20th, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanies his original petition to the governor for said lands, reference being had for more particular description to the said original grant of said lands, and the said map belonging thereto, filed in this cause and copied in said transcript, provided the lands contained within said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity and no more, within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity.

This decree became final by order of the Attorney General not to prosecute appeal.

The first survey of Sausal Redondo is said to have been made by Henry Hancock, in 1858, embracing five square leagues.

Surveyor General Upson, in his letter to Surveyor General
155 Day, of 11th December, 1868, says that Hancock's survey was suspended under General Mandeville and rejected under Surveyor General Beale.

The 8th section of the act of 23d July, 1866 (14 Stat., 220), provides that in all cases where a survey and plat of confirmed private land claims (under Spanish and Mexican title) should not be asked for within ten months after the passage of the act, the surveyor general shall set off the quantity of land confirmed by the final decree, and all the land not so set off shall be subject to the general land laws of the United States. Pursuant to the terms of this act the surveyor general, at the instance of Gen. W. S. Rosecrans, who paid the expense of the survey, directed Geo. Hansen to segregate the grant to Abila from the public lands. He did so in February, 1868, the survey of Sausal Redondo, covering about five square leagues. In the following May the owners of Sausal Redondo filed a protest against Hansen's survey, calling the attention of the surveyor general to the fact:

1st. That the owner of that claim had applied to the surveyor general for an estimate of the survey under the act of 1864. (An application which the surveyor general states never reached him.)

2d. That the notice of the survey by Hansen had not been
156 given to the parties in interest, as it seems the Commissioner of the General Land Office had directed to be done.

3d. That the segregation did not comply with the decree. In consequence of this protest Surveyor General Upson, on 26th May, 1868, recalled the plats of Hansen's from the local office, and directed a survey under the act of 1864. This was executed by G. H. Thompson, in July, 1868, and embraced 48,759 acres (nearly eleven square leagues, which would contain 48,825$\frac{5}{10}$ acres.) This is the survey now before the Department on appeal. The lands lie within a few miles of Los Angeles, and are now quite valuable. After Hansen's survey the part of them supposed to be public lands, and so set off,

was soon occupied by numerous settlers, claiming under the title of the State of California. As the Thompson survey covers their claims it has naturally excited great alarm and opposition.

The Thompson survey was disapproved both by the surveyor general and the Commissioner of the General Land Office.

They are nearly of the same opinion as to where the northern boundary of the rancho should be, but differ materially as to the eastern line.

As to the lines on the south and west there seems to be no
157 dispute. The award of the Commissioner embraces somewhat more land than the surveyor general. Just how much is not stated. The rude map which accompanied Abila's original application, and to which reference is made in the decree of the court, is of rectangular form, bounded on the north by the lands belonging to the city of Los Angeles, on the east by the Rancho Los Cuerbos, on the south by the Rancho Gutierres, and on the west by the Rancho Bayona.

There is a scale of miles attached to it. According to this scale it is said that the map measures five square leagues, and the objectors to the Thompson survey vehemently insist that this was the quantity granted.

The owners of the rancho lay great stress on the last words of the decree: "Provided the lands contained within said boundary do not exceed eleven square leagues, then confirmation is hereby made for that quantity, and no more, within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made to such less quantity."

They insist that inasmuch as eleven square leagues have been found within said boundaries they are entitled to that quantity. It is not easy to reconcile the proviso of the decree with what goes before it. The decree begins with confirming the decision
158 of the board of land commissioners. That decision gave the claimant five square leagues.

The decree states that the lands confirmed are the same granted by Alvarado, 20th May, 1837.

In Alvarado's grant no quantity is specified; but Pico's grant, in 1846, expressly limited the quantity to four square leagues, a little more or less. It is true that the decree makes no mention of Pico's grant, but there can hardly be a doubt that Abila asked of him the same lands he had asked and obtained of Alvarado.

How the four of Pico became five of the board of land commissioners, and their five the eleven in the proviso of the decree, is matter of speculation, and is not shown in the case.

The decree goes on to describe the lands confirmed as "being of the extent and within the boundaries of the map which accompanies his (Abila's) original petition to the governor for said lands, reference being had for more particular description to the said original grant of said lands, and the said map belonging thereto, filed in this cause and copied in said transcript."

These words give great importance to the map referred to, and in the long and elaborate arguments of counsel, as well as the decisions

of the surveyor general and Commissioner, frequent reference is made to it.

159 An inspection of it is far more satisfactory than any description can be. The city lands, ejidos, commons, were not, at the time of Alvarado's grant, distinctly marked out, and the words of the grant plainly show that it was not known whether the lands granted would fall within the ejidos or not.

The 2d clause reads: "That if the land referred to in the foregoing proposition should be included within the ejidos, the grantee will be subject to the payment of the corresponding tax."

The city claimed 16 square leagues—two leagues from the centre of the plaza north, south, east, and west.

This claim has, however, been settled as covering only four square leagues, one league from the plaza towards each of the cardinal points.

The survey of Thompson goes to this limit, as determined by the courts.

The Commissioner makes the northern boundary of the rancho, the east and west line, two leagues from the plaza.

The parol evidence produced seems to indicate that at the time of the grant the ejidos were commonly supposed to extend over the whole of Abila's claim.

160 The case is a difficult one. After the best examination I can give it, I very reluctantly dissent from the views of the surveyor general and also of the Commissioner.

Abila, in his will, speaks of this ranch as containing four square leagues. It is enumerated in the inventory of his effects (real and personal) as five.

The court confirmed it as within the boundaries of the map. The scale on the map makes it about five leagues. But for the last clause of the decree no question could arise as to the quantity.

Shall that clause override all the other considerations? If so, the claimants should have eleven leagues allowed them, for that quantity has been found and surveyed within the colindantes named on the map. If to this it be objected that the limit to the ejidos was not then what it is now, the answer is that there is no definite showing where they then terminated.

The map is a rectangular; must the survey be of that precise shape?

In the southeast corner there is on the map quite a large, dry lake; on the southwest corner, a considerable portion of the sea. Must the survey go as far into the lake and sea as the map lines go? How that clause about the eleven leagues got into the decree can only be conjectured. That it got there honestly is very ques-

161 tionable. Had Abila lived till the survey was made we should, in my opinion, never have heard of more than five leagues being claimed.

I think the Hansen survey does substantial justice between these

parties, and I recommend that it be approved, and that the township plats made by him be restored.

Very respectfully,

W. H. SMITH,
Assistant Attorney General.

Hon. C. DELANO,
Secretary of the Interior.

(2.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 31*st Oct.*, 1871.

SIR: I enclose herewith a copy of the opinion of Hon. Walter H. Smith, Assistant Attorney General, in the matter of the survey of the California private land claims, known as "Sausal Redondo." I concur in the views set forth in the opinion, and you will give the orders necessary to carry them into effect.

The papers accompanying your letter of 28th January last are herewith returned.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. WILLIS DRUMMOND,
Commissioner General Land Office.

162 Defendant then offered in evidence a protest of the owners of Rancho Sausal Redondo, dated May 23d, 1868, protesting against the Hansen survey of said rancho; to the introduction of which plaintiff objected, upon the grounds that the same is irrelevant, immaterial, and incompetent, as it appears upon the face of said document that it is only a statement of an attorney as to the facts therein set forth, and there is no evidence that the party who signed the same was the attorney of the parties he purports to represent.

Which objection was by the court overruled, and the same admitted to show that there was a protest at the time, and the reasons therein stated for the protest; to which ruling the plaintiff then and there excepted in due form of law. Said document being as follows:

SAN FRANCISCO, *May 23d.*

Hon. L. UPSON,
Surveyor General U. S.

SIR: As attorney for the owners of the Rancho Sausal Redondo, in Los Angeles county, I beg leave to call your attention to the matter of the survey lately made at that place under the act of Congress of July 23d, 1866, and to represent to you the condition of the case.

A final decree was entered, and a survey of the rancho was made under Surveyor General Mandeville, as far back as 1858, by
163 Deputy Surveyor Hancock. That survey was suspended for examination in the surveyor general's office, upon representation of the owners that the lines did not reach his well-defined boundaries, viz., Rancho Los Cuervos on the east and the Pueblo

lands of Los Angeles on the north, as clearly set forth in the grant, deseño, and final decree of confirmation.

The question was not settled by the surveyor general, Mr. Hancock's survey became obsolete, and the acts of 1860 and 1866 have since been passed whereby the whole system of surveying private land claims in California was altered. The administrator of the estate of Abila, the original grantee, bewildered by the multiplicity of laws, and supposing that the Hancock survey was still awaiting your action under the protest which he had filed, did not attempt to comply with the act of 1864; and when he was informed that it was necessary to act, the estate was unable to advance the expense of a new survey.

However, as I am informed, Mr. Burnet, who had lately become one of the owners, during the past year addressed a written request to your office for an estimate of the expense of the survey, and proposed to advance the necessary funds himself. This letter from some cause was never answered by your office, or, if answered, was lost in transit.

164 The law of 1866 contemplates that surveys shall be made and land set apart to ranchos finally confirmed after the expiration of ten months from the passage of that act, should the parties in interest neglect to request a survey and plat in compliance with the act of 1864.

I am informed that certain parties, representing themselves to be settlers under the United States, demanded a subdivision of land claimed to be of the public domain, and that the land confirmed under the grant of the Sausal Redondo should be segregated in satisfaction of the decree, on the ground that the ten months allowed under the act of 1866 had expired. Thus called upon, under the law it became your duty to act; but I respectfully submit that, in conferring upon you an extraordinary power, which is generally exercised only by courts of justice, and in due forms of law, Congress did not contend that the letter of the act should be followed and its spirit ignored.

And I suggest that, in analogy to all usual proceedings involving the adjustment of private rights, notice should have been given to the illiterate and uninformed owners before a survey was made, which, in the present case, amounts almost to a confiscation of property. The decree following the grant and deseño confirms to the claimant eleven square leagues of land within definite and

165 well-known boundaries; and the act of 1866 makes it the duty of the surveyor general to set apart land enough to satisfy the decree. But in this case the law was not complied with, as only five leagues were set apart in satisfaction of a decree for eleven leagues. The old ranch house and the Sausal Redondo, from which the ranch took its name, were excluded, and well-known boundaries ignored. The survey was, therefore, a false one, and should be set aside by the surveyor general on this ground, *ex mero motu*.

This being done, and all things then being as before an attempt at segregation, I respectfully apply for a survey and plat under the act of 1864, and under all the circumstances, and the manifest

equities of the case, I rely confidently upon your well-established desire to conform to the spirit of the acts controlling your office, as well as your sense of justice, to order such survey; and, in behalf of the owners, I now pay and deposit the amount necessary for the work.

I submit the following as a resumé of the arguments on which I rely:

1. That the first survey under Surveyor-General Mandeville was never formally passed upon, and the claimant had a right to be informed of the decision upon his protest before a new survey was made.

166 2. Notice should have been given that this case was open to a new survey under the requirements of the act of 1866 and 1864, and an opportunity afforded the claimants to pay for the survey and obtain a patent.

3. The decree not having been complied with in the late attempted segregation, the only question left is whether, after the lapse of ten months, the owner in all cases loses the right to pay for a survey and plat, and thus have the advantage of a patent, which latter does not seem to be provided for where land is set aside in satisfaction of the grant under the act of 1866.

4. That fundamental principles were disregarded in making a survey against a grantee holding a decree of confirmation, without notice and without an opportunity to point out boundaries and landmarks, or to produce title papers and proofs against an erroneous survey.

Very respectfully, your obedient servant,

E. R. CARPENTIER.

(Indorsed:) Office exhibit No. 2. Protest of attorney of Sausal Redondo as to segregation under act of 1866. Filed May 23, 1868. United States surveyor general's office, San Francisco.

167 Defendant then offered in evidence the affidavit of Robert Thompson, made and filed in the office of the county recorder of Los Angeles county, California, on the 21st day of April, 1868, being the only affidavit ever filed therein by said Thompson (and endorsed on the following description of land, to-wit:)

Affidavit and description to accompany the application.

Los Angeles county, No. —, township 2, range 14, section 6, N. E. ¼, W. ½ of S. E. ¼, and S½ of S. W. ¼ of 23, containing 320 acres, located April 22, 1868; surveyed March 1st, 1868, by U. S. Surveyor General. Filed April 22, 1868, T. D. Mott, recorder. By S. H. Mott, deputy.

Defendants then offered in evidence the application of Robert Thompson to the State of California to purchase said land, dated May 1st, 1868, and sworn to April 21, 1868, marked accepted May 1st, 1868, together with all endorsements and entries thereon as attached thereto, together with the application of the State locat-

ing agent to the register and receiver of the U. S. Land
168 Office for the land; also the certificate of register attached thereto, with acceptances of that application, dated May, 27th, 1868.

To all of which plaintiff objected, upon the grounds that the same was irrelevant, immaterial, and incompetent, and upon the further ground that the defendant herein claiming the land in controversy, as a pre-emptor under the laws of the United States, and holding the same adverse to the State title, and not being privity therewith, he cannot, in this proceeding, enquire into a question any of the proceedings taken by the plaintiff herein or his grantor, to purchase the land of the State.

Which objections were by the court overruled, and said documents admitted to evidence; to which ruling plaintiff excepted in due form; all of which are as follows:

Affidavit

To accompany application to purchase State lands, as required by act of Legislature, passed April 22d, 1863.

I do solemnly swear that I will support, protect, and to defend the Constitution and Government of the United States against all enemies, whether domestic or foreign:

169 That I will bear faith and true allegiance and loyalty to the said Constitution and Goverament, any ordinance or law of any State, convention or Legislature, or any rule or obligation of any society or association, or any decree or order from any source whatever, to the contrary notwithstanding:

And that I will support the constitution of the Stafe of California; and further, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever, and that this oath is not taken for the purpose of acquiring title to, or interest in, or possession of, any land, in order that such title, interest, or possession may be transferred to any person or persons to enable such person or persons to evade the provisions of any law of the State of California, or any regulation of the General Land Office at Washington.

(Signed) ROBERT THOMPSON.

Subscribed and sworn to before me, this 21st day of April, 1868.

(Signed) GEORGE S. CLARKE,
Notary Public.

I certify the above affidavit and endorsed description of land to be true copies of the originals on file in the office of the county recorder.

[SEAL.] (Signed) T. D. MOTT,
County Recorder,
By S. H. MOTT, *Deputy.*

170 Certificate 4766, July 22d, 1872. Patented April 21st, 1874. Grant of the 16th and 36th sections for school purposes. San

Francisco land district. Location No. 1377. San Bernardino meridian. Township No. 2 S., range No. 14 W., section 23. N. E. ¼, W. ½, S. E. ¼. and S. ½ S. W. ¼. Taken in lieu of west ½, section 16, in township No. 9 W., range No. 17 W., San Bernardino meridian, containing 160 acres, in lieu of 160 acres located for Robert Thompson by Leander Ransom, locating agent. Received and filed 17th June, 1868. Approved 27th June, 1872. Robert Gardner, surveyor-general, by ——— ———, deputy. Duly certified to be a copy by register of State land office.

171 *Application for Location under the State.*

SAN FRANCISCO LAND DISTRICT,
SAN FRANCISCO, *May* 1, 1868.

Location No. 1377.

To State locating agent:

I, Robert Thompson, of Los Angeles county, State of California, do hereby apply under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27, 1863, to purchase and locate the following described land in Los Angeles county:

The northeast quarter, west half of southeast and south half of southwest quarter of section twenty (23), township two (2), south of range fourteen (14), west of San Bernardino meridian, containing three hundred and twenty acres, according to the returns of the United States surveyor-general, and which I agree to accept in lieu of the full amount of (320) acres, for which I agree to pay to the State of California one dollar and twenty-five cents per acre, in the following manner, viz, twenty per cent. of the purchase money, together with interest on the balance at the rate of ten per cent. per annum, in advance, from the date of location in the locating agent's office.

172 This location has been made by me in lieu of W. ½ of Sec. 16, T. 9 N., R. 17 W., San Bernardina meridian, which is in a private grant.

Location No. —.

STATE OF CALIFORNIA, *County of Los Angeles:*

San Francisco Land District.

I, Robert Thompson, of Los Angeles county, State of California, being duly sworn, depose and say: That I am a citizen of the United States and a resident of the State of California, of lawful age; that I am an applicant for the purchase and location of the above described lands; that the same are unoccupied by any person other than myself, and that to the best of my knowledge and belief there is no valid claim existing upon the land so described adverse to the claim I hold and apply to be located, and that there is no improvement of any description on said land other than my own.

Witness my hand.

ROBERT THOMPSON.

Sworn to and subscribed before me this 21st day of April, 1868.

GEORGE J. CLARKE,
Notary Public.

[Five cts. int. rev. stamp.]

We, William Sofer, James Bruen, and Geo. H. Graham, of Los Angeles county, State of California, being duly sworn, each for himself, deposes and says: That he is acquainted with the
173 lands described in the above application and sought to be located by the above named Robert Thompson; that there is no valid claim existing upon the land so described adverse to the claim above made, nor any improvements other than those owned by the said applicant, to the best of his knowledge and belief, and that he neither has nor expects to have any interest, directly or indirectly, in the claim so desired to be located by said Robert Thompson.

Witness our hands.

GEO. H. GRAHAM.
WILLIAM his x mark. SOFER.
JAMES B. BRUEN.

Sworn to and subscribed before me, this 21st day of April, A. D. 1868.

GEO. J. CLARKE.

[5-ct. int. rev. stamp.]

I, Leander Ransom, State locating agent for the San Francisco land district, do hereby accept the above offer, under the following conditions: That if such location be made and approved by the United States, it shall be for the use and benefit of the applicant, on his complying with all the conditions and provisions of the act for the location and sale of lands belonging to the State, approved April 27th, 1863.

LEANDER RANSOM,
Locating Agent.

Office of locating agent, San Francisco, May 1st, 1868.

174 *Grant of the 16th and 36th Sections for School Purposes.*

STATE OF CALIFORNIA, SAN FRANCISCO LAND DISTRICT,
LOCATING AGENT'S OFFICE.

(Location No. 1377.)

I hereby certify that in accordance with the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, and with the instructions of the surveyor general, I have located as a portion of the school land three hundred and twenty acres of public land in the county of Los Angeles, at the request and for the use of Robert Thompson. Said land is described as follows:

N. E. ¼ and W. ½ of S. E. ¼ and S. ½ of S. W. ¼ of section 23, T. 2 S., R. 14 W., San Bernardino meridian.

Taken in lieu of W. ½ of Sec. 16, T. 9 N., R. 17 W., San Bernardino meridian.

This location has been made by me by filing an application for the same in the name and for the benefit of the State of California at the United States land office for the San Francisco district, in the city of San Francisco, and with the consent of James W. Shanklin, register of said district, bearing date the 27th day of May,
175 A. D. 1868, and the same is entered and numbered upon my register of locations.

Witness my hand, at office, in San Francisco, this 27th day of May, 1868.

LEANDER RANSOM,
State Locating Agent for the San Francisco Land District.

SURVEYOR GENERAL'S OFFICE,
SACRAMENTO, *June 27th*, 1872.

The above location is hereby approved, and the treasurer of Los Angeles county shall receive in payment therefor from Robert Thompson ninety-six $\frac{26}{100}$ (96.26) dollars, within fifty days from the record of the surveyor general's approval, being twenty per cent. of the purchase-money and one year's interest on the balance, in advance, at the rate of ten per cent. per annum from the date of location in the locating agent's office.

ROBERT GARDNER,
Surveyor General.

Defendant then offered in evidence the certificate of purchase issued to Robert Thompson, No. 4766, for lands included in location No. 1377, dated Sacramento, July 24th, 1872, on which the patent to Robert Thompson was issued.

To the introduction of which plaintiff objected, upon the
176 grounds above stated, which objections were by the court overruled, and the same admitted as evidence; to which ruling the plaintiff excepted in due form. Said certificate is in usual form and bearing the date and number mentioned.

Defendant then offered in evidence the selection and location of the land, described in said application of Robert Thompson, by the State locating agent, on the 27th day of May, 1868, together with the acceptance and approval thereof by the register and receiver of the U. S. district land office at San Francisco, on the same day and in satisfaction of said application.

To the introduction of which plaintiff objected, upon the grounds above stated, which objections were by the court overruled [and] the same admitted; to which ruling plaintiff excepted; which are in the words and figures, as follows:

Grant of the 16th and 36th Sections for School Purposes.

STATE OF CALIFORNIA, SAN FRANCISCO LAND DISTRICT,
OFFICE OF THE STATE LOCATING AGENT,

* * * * * * *

No. 1057. *May 27th*, 1868.

And under the provisions of the same act, I also apply, in lieu of W. ½ of section 16, in township No. 9 N., range N. 17 W., San Bernardino meridian, which the State is compelled to relin-
177 quish, from the fact it is included in a private grant, for the following-described tracts of land, to wit: N. E. ¼, W. ½ of S. E. ¼, and S. ½ of S. W. ¼, Sec. 23, T. 2 S., R. 14 W., S. Bernardino meridian.

The above-described lands are selected for said State under the 6th and 7th sections of an act of Congress entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3d, 1853. The said tracts contain 80 and 320 acres, which I agree, as agent of said State, to accept in lieu of the full amount of 400 acres.

LEANDER RANSOM,
Locating Agent.

SAN FRANCISCO LAND DISTRICT OF THE STATE OF CALIFORNIA,
UNITED STATES LAND OFFICE, SAN FRANCISCO, *May* 27, 1868.

* * * * * * *

1508.

No. 1057.

And in lieu of W. ½ section 16, in township No. 9 N., range No. 17 W., San Bernardino meridian, the following lands, to wit: N. E. ¼, W. ½ of S. E. ¼, and S. ½ of S. W. ¼, Sec. 23, T. 2 S., R. 14 W., San Bernardino meridian, which selections I have filed, subject to any valid adverse claim.

178 The above-described tracts of land contain 80 and 320 acres, and are selected under the provisions of "An act of the California Legislature, approved April 22d, 1861, and April 27, 1868, in part satisfaction of the grant made by the 6th and 7th sections of the act of Congress, approved March 8th, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes." Taken for 400 acres.

JAMES W. SHANKLIN,
Register.

SYLVESTER ROGERS was then introduced as a witness by the defendant, and, after being duly sworn, testified, in substance, that he was 54 years old; was intimately acquainted with the land in dispute, and adjoining lands, for about nine years.

Counsel for the defendant then put to the witness the following questions:

Question. There is an application, Mr. Rogers, signed by you, to purchase some lands near this tract in question, in 1868, and there seems to be a deed from you, of about the same date, of that land to W. S. Rosecrans. Please state the facts connected with that transaction.

Counsel for the plaintiff objected to the question as irrele-
179 vant and immaterial. Whereupon counsel for defendant stated that he expected to prove by this witness, in answer to his question, that W. S. Rosecrans, through witness Thompson and others, acquired more than 320 acres of said land, in violation of law, and thereby practiced a fraud upon the State of California.

Whereupon counsel for the plaintiff made the further objection to the question that it not appearing by any competent testimony that the defendant was in privity with the General Government, and he claiming no right to the land under the State of California, that it is not competent for him in this action to inquire into any objection of fraud practiced upon the State of California in acquiring a title to this land, and upon the further ground that there is no allegation in the complaint that the plaintiff in this action was a party to or had any notice of any fraud practiced upon the State of California by Rosecrans, Thompson, or any other person in acquiring title to the land in controversy in this action, and upon the further ground that the question calls for an answer as to other and different lands than that in controversy in this action.

All of which objections were by the court overruled, and witness permitted to answer the question; to which ruling counsel for plaintiff then and there in due form of law excepted.

To which question witness answered:

180 "Well, I can state it. When Mr. Rosecrans was surveying off that land to locate with warrants, I went to him and asked him if he couldn't give me a show for a piece of land to make a home, as I had no home in the country, and I had a large family; and he went to Mr. Larabee and told him to point out some land that was unoccupied on the map to me, and told me to go and look at that, and if any of that suited me to come back and report. He pointed out two quarter sections, near—well, I can't tell exactly the numbers now. I went and looked at the land, and he told me to see if there was anybody on it, or any improvements on it at all, and I went and looked and there was not, and I came back and reported that the east quarter would suit me very well; and he told Mr. Larabee then to come and locate the school warrants—one for myself and one for him. And I went out there and took the stakes and posted the school notices on the corners myself, and came back, and Mr. Larabee drew up the deed himself. Then he drawed up an instrument in writing binding Mr. Rosecrans that he gave me two years to pay for this quarter section, by paying one per cent. interest, at $1\frac{1}{4}$ per acre. I was to have the east quarter and he was to have the west quarter, and Mr. Larabee drawed up a deed and I signed it, and he gave me this instrument in writing binding Mr. Rosecrans to give me a deed for the east quarter when I paid for it at the expir-

181 ation of the two years. That is the way I signed the deed that he had written out for the west quarter that I located for him. I don't recollect signing any other papers. There was no other papers presented to me to sign. I am not familiar with the technical names so as to know whether the instrument was a school warrant or notice. I saw nothing but these notices they gave to post up on the land; it was school notices, school locations. I never paid Rosecrans anything, and he never paid me anything."

All of which evidence counsel for plaintiff moved to strike out, upon the grounds expressed in the exceptions before given, which motion was by the court denied; to which ruling plaintiff excepted.

Witness further stated that he offered to purchase two quarter sections—one for himself and one for Rosecrans. I did not know Mr. Rosecrans in the transaction after I spoke to him about the land. Mr. Larabee did all the business and kept all the papers. I did not file the application in the State land office or have anything more to do with them. I never paid any fees to locating agent, surveyor general, or any other officer. I afterwards sold 80 acres of my quarter to Mr. Hough, he paying in consideration therefor the whole quarter section.

Counsel for the defendant then asked the witness the following question:

182 Q. Did you swear in any oath taken at that time that the same was not made for the purpose of acquiring title to, interest in, or possession of any land in the State in order that such title, interest, or possession might be transferred to any person or persons, to enable such person or persons to evade the provision of any law of the State of California?

To which question witness answered: "I did not."

Counsel for plaintiff moved to strike out all the testimony of last witness, upon the grounds stated in the objections made thereto, and upon the ground that the same is immaterial and irrelevant.

Which motion was by the court denied.

To which ruling counsel for the plaintiff then and there in due form of law excepted.

M. TEED was then called by defendant as a witness, and duly sworn, and testified that he was 51 years of age; by occupation a carpenter, and resided in the county about 12 or 13 years.

Counsel for the defendant then put the following question to the witness:

Q. On March 6th, 1868, it appears, Mr. Teed, that you made an application to purchase the east ½ of section 6, township 3 south, 13 west, a part of the land in dispute in this case, or land

183 adjoining, and that the same day, or about that time, you made a deed of the same land to W. S. Rosecrans. Please state the facts in connection with that transaction.

To which question counsel for plaintiff interposed the same objections to the question hereinbefore stated to the witness Rogers, which objections were by the court overruled.

To which ruling counsel for the plaintiff then and there in due form of law excepted.

To which question witness answered:

"Well, I don't remember making any application, but I know this: I know there was a crowd of us around on the street that day, and there was some teams going out in the country. I didn't know whether it was for to purchase land, or what it was. I knew nothing about school warrants at that time, but we went out there; went up there, a little beyond the six-mile house; went up to the point of the hill; looked around. He said there was some land near that they were going to take up. I didn't know anything about it. I didn't care, and didn't know they would give a five-cent piece an acre for it. We came back here, and I signed my name. That was all I know about it, and I had $5 for it, I believe. I don't remember whether it was Larabee, or who it was paid me. I don't
184 remember who asked me to go out. We went just promiscuously. I should say that there was between 20 and 30, and I don't know but more, that went out. I don't know how many teams there were. I think there were at least two."

Q. Who caused these men to go out there?

A. Well, I have no idea. I think Mr. Stanley was interested in it in some shape, and Larabee was acting as the attorney of Rosecrans, I think.

Q. What did these people go out there for?

A. Well, they went out there and acted the fool, like myself; we went out there and looked around the country, and came back and signed papers.

Q. The object of these twenty or thirty was to go out there and take a look at the land, come into town, and apply for it for Mr. Rosecrans?

A. I didn't know they were applying for it. I didn't know whether it was as witness or what it was. I paid no attention to it. I didn't care for it. I didn't want the land for myself. There was no contract about this matter. Any person went who wanted to go.

Q. How many papers did you sign, do you remember?

A. I do not.

Q. Did you swear to them?

A. I don't remember swearing to anything. I can't say for certain. I don't remember it.

185 Q. Did any of you execute a deed to anybody?

A. Not that I am aware of. I don't know. I won't be positive on anything more than I believe I just signed my name; but I don't know what it was. I think if I had been sworn to anything—I don't think I had to swear to anything unless I had read it over or somebody had read it over to me.

Q. What did you do with those papers after you signed them?

A. I did nothing. Nothing to do with them. Never paid any attention to them I say. Never paid any fees in connection with

them, and never filed any papers or any application with the State to purchase the land.

All of which evidence counsel for plaintiff moved to strike out on the grounds stated in the objections thereto, on the ground that the same is immaterial and irrelevant, and upon the further ground that there is no allegation in the cross-complaint of collusion between witness and General Rosecrans or any other person, which motion was by the court denied. To which ruling counsel for the plaintiff then and there in due form of law excepted.

JOHN RHODES was then called as a witness on part of the defendant, and being duly sworn, testified that he was 37 years old,
186 and resided in the county ten years, and was acquainted with the lands known as the Rosecrans lands.

Counsel for defendant then put to witness the following questions:

Q. Mr. Rhodes, it seems that on the 6th day of March, 1868, you signed an application for the W. ½ of section 11, township 3 south, range 14 west, San Bernardino meridian, and on the same day signed a deed for the same land to W. S. Rosecrans. Will you state the facts connected with that whole transaction?

Counsel for the plaintiff objected to the question, on the ground that it was irrelevant and immaterial, and on the further ground that it not appearing by any competent testimony that the defendant was in privity with the General Government, and he claiming no right to the land under the State of California, it is not competent for him in this action to inquire into any question of fraud practiced upon the State of California in acquiring a title to this land, and upon the further ground that there is no allegation in the complaint that the plaintiff in this action was a party to, or had any notice of, any fraud practiced upon the State of California by Rosecrans, Thompson, or any other person in acquiring title to the land in controversy in this action; and upon the further ground
187 that the question calls for an answer as to other and different lands than that in controversy in this action.

Which objections were, by the court, overruled and the witness permitted to answer the question.

To which ruling counsel for plaintiff then and there in due form of law excepted.

Witnessed answered:

I was standing over here by the United States, I remember, that day, and there were several carriages came up here in front of Temple Block. I asked some one over there who knew what was going on, and they said it was a party going to look at some land beyond the six-mile house for General Rosecrans, and said that I had better go along and get $5 and get a ride out there. I had nothing else to do and went along. We went out there, rode over the land, came back here in town, and went into an office there and signed a paper. I don't know that I could swear what the paper was; I signed it

just because the rest did. The rest all went along as I did, and when it came my turn I signed. I did not swear to the papers. I got $5 the same as the rest.

Q. At whose instance did you go out on the land—at whose instance did you sign the papers that you signed?

188 A. I can't tell you. This friend of mine, as I said, said that they were going out there to look for land, and said I had better go along. I never made any contract with any one at all.

Q. Where were you paid the $5?

A. Up in old Temple Block. I think Larrabee's office. I knew nothing about the business. I only heard General Rosecrans was going out to look at some land. I did nothing with the papers I signed. I never saw it after signing. I paid no fees on account of the paper signed by me. I never had anything more to do with the business.

Q. How many men were there went along in the carriage?

A. Indeed, I couldn't tell; I think there were four or five carriages; there might have been thirty, and might have been more or less; quite a party. I didn't read what I signed in the office.

Counsel for plaintiff moved to strike out all the evidence of the last witness on the ground that the same is irrelevant and immaterial, and upon the further grounds expressed in the objection made to the admissibility of the evidence, which motion was by the court denied.

To which ruling counsel for plaintiff then and there in due form of law excepted.

Defendants then offered in evidence an application made

189 by W. S. Rosecrans, dated April 22, 1868, for 320 acres of other land than the land in controversy to the State of California, under the act of March 27th, 1863, to show that he had exhausted his right to purchase State lands by his own application.

To the introduction of which plaintiff objected, upon the grounds that the same was irrelevant and immaterial; which objection was, by the court, overruled, and the same admitted in evidence; to which ruling plaintiff excepted.

Said application was in the name and form as hereinbefore set out in full, and was of the date and for the amount of land above mentioned.

Defendant then offered certificate of purchase and patent from the State of California, issued to W. S. Rosecrans in satisfaction of his said application of April 22, 1868, for the 320 acres of land therein described.

Defendant then offered in evidence deeds executed by the witnesses Rogers, Teed, and Rhodes to W. S. Rosecrans, each conveying 320 acres of land, and dated March 12th, 6th, and 6th, 1868, respectively, being the same land described in the application of said parties to purchase of the State of California, and also offered to prove that several thousand acres (from ten to fifteen thousand acres), ad-

joining the land in controversy, obtained in like manner by
190 dummy applications for said Rosecrans; to all of which plaintiff objected on the ground that the issue was irrelevant and immaterial; which objection was, by the court, overruled, and the deeds of Rogers, Teed, and Rhodes were admitted as evidence, and defendants granted the privilege of filing copies of other deeds referred to; to which ruling plain[tiff] then and there *accepted* in due form. The deeds offered were in usual form, and purported to convey land described in the several applications of the witnesses above mentioned, and all within the Thompson survey of the Sausal Redondo grant. Defendant then offered in evidence decision of Secretary of Interior, dated March 10th, 1876, in the case of G. B. Selvie, to show that an invalid State selection is no bar to a valid pre-emption claim.

To the introduction of which plaintiff objected upon the grounds that the same is irrelevant and immaterial, and the object for which it is introduced is a question of law and not of fact; which objection was, by the court, overruled, and said documents read in evidence, said documents being as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March 10th*, 1876.

SIR: I have considered the application of Geo. C. B. Selby *et al.*, pre-emptors, to be permitted to prove up and pay for certain
191 lands in T'p 2 S., R. 13 W., and 2 S., R. 14 W.; also the application of James M'Evoy *et al.*, to be permitted to file for certain lands in T'p 2 S., R. 13 W., S. B. M., Los Angeles district, California, all of said lands being claimed adversely by the State of California, under selections made by her. The case is before me on appeal by the said pre-emptors from your adverse decision of December 14th, 1874. It is alleged that the State selections were made in violation of law, and are, therefore, invalid, and no bar to the rights of the pre-emptors.

If the allegations are true the rights of the pre-emptors must be admitted, for it is the established rule of this Department that an invalid State selection does not reserve the land it covers from appropriation under the pre-emption and homestead laws. See the decision of March 1st, 1875, in case of Francisco Aurrecoechea *vs.* State of California *et al.* (Copp's Land Laws, p. 325); of April 8th, 1872, in case of State of California *vs.* Spaile and Watson, (Ib., p. 324), and of February 5th, 1875, in case of M'Lain *vs.* Stanley.

It appears that the selections by the State were made under the sixth section of the act of July 23d, 1866 (14 Stat., 218), of lands in lieu of certain school sections, 16 and 36, which, it is alleged, were lost to the State by reason of being included in Spanish or Mexican grants.

192 They antedate the claim of the pre-emptors, and for this reason alone, without considering the question of the validity of the said State selections, you reject the pre-emption claims. You have not forwarded any data with the case to enable me to judge of the validity of the said selections, but on an examination of the

records of the proper division of your office I find that in nearly every instance the school sections alleged to be lost to the State, and in lieu of which these selections are made, are included in the limits of a grant not yet adjusted, and without final survey.

The question of the loss of such lands to the State had not been settled, for the law just quoted provides that such question shall be determined "in case of Spanish or Mexican grants, when the final survey of such grants shall have been made." The State had not lost the land, and was not entitled to select indemnity therefor. Her pretended selections were, therefore, without authority of law and void. She cannot be permitted to substitute other lands actually lost and thereby preserve her selections so as to defeat the claim of said pre-emptor, for such substitution would be virtually a new selection, taking effect from its date. See case of State of California *vs.* Haile and Watson (Copp's Land Laws, p. 324.) You will, therefore, cause careful examination to be made of the State selections, with a view of determining their individual validity, and
193 where you find them invalid by the rule just indicated reject the same, and examine the pre-emption claims upon their merits.

In cases where persons claim under the homestead or pre-emption law, and apply to enter or file upon lands covered by a State selection alleged to be invalid, they should be permitted to contest the same after due notice to the State; and if, after investigation, it appears that the State selections is invalid, as alleged, it should be cancelled, and their entries or filings be received as of the date they were offered.

I reverse your decision, and return the papers in the case transmitted, with your letter of August 16, 1875.

Very respectfully,

Z. CHANDLER, *Secretary.*

To the Com'r of the Gen'l Land Office.

It was stipulated that Wm. Minis, surveyor general, would testify to the facts set out in his certificate pertaining to said land, which certificate is in the following form:

OFFICE OF SURVEYOR GENERAL,
SACRAMENTO, CALIFORNIA.

I hereby certify that I have made diligent search therein, and that the records of this office do not show that the United States surveyor general for the State of California ever furnished
194 the State authorities with list or lists including any of the above-named sections or any part thereof as a basis of selection of other lands in lieu thereof.

Witness my hand and seal at office, this 25th day of May, A. D. 1877.

WILLIAM MINIS,
Surveyor General.

Defendants then offered like certificate from U. S. surveyor gen-

eral to show that no list ever furnished of any land as a basis of such selection or any of them.

The above certificate of Mir is being admitted over the objection that the same was irrelevant and immaterial.

GEORGE W. FRASHER was called as a witness in his own behalf and testified substantially as follows:

He testified to all the facts necessary to show him a qualified pre-emptor; that he settled upon the land, built a house, dug a well, and had each year since his settlement cultivated portions of the land. That on the 17th of September 1876, he went to U. S. land office, filed his declaratory statement, or a pre-emption, claiming this land, and tendered and paid the officer all legal fees. He paid him $5—all he asked—more than six months thereafter. I went
195 to the land office and tendered my final proof and payment for the land, which was refused, and I appealed to the Commissioner of General Land Office from the refusal; the final proofs were reduced to writing and duly sworn to before the register and receiver, and then and there deposited and left in their official custody and before said appeal was taken.

Counsel for defendant asked the witness the following questions:

Since your settlement on the 16th day of June, 1879, did you make any application to purchase said lands without abandoning your pre-emption claim; did you make any application to purchase these lands of the State of California?

To which plaintiff objected upon the grounds that the same was irrelevant, immaterial, and incompetent. Which objections were by the court overruled, and the witness permitted to answer. To which ruling plaintiff excepted, and witness answered:

I did apply to the State. I have forgotten the dates.

WILL D. GOULD was sworn as a witness, and testified:

That as an attorney for defendant Frasher, he prepared an application to the State of California to purchase the land in con-
196 troversy, and did forward the same to W. Minis, surveyor general of the State of California, at Sacramento, with a letter enclosing the same, with $5 as the fee for filing. I registered the letter, and sent the same, as before stated, and subsequently received the receipt of said Minis of said registered letter.

All of which testimony was admitted by the court against the objection of plaintiff. But the same was irrelevant, immaterial, and incompetent, and plaintiff duly excepted to the ruling of the court overruling his objections thereto, and moved to strike the same out for the reasons expressed in the objection, which motion was denied; to which ruling the plaintiff excepted.

Mr. FRASHER recalled, and upon cross-examination stated that he was informed by the register at the time he tendered his filing that the same could not be endorsed, filed, and that he tendered

$100 in silver coin in payment for the land, and the register and receiver told me the tender was sufficient. I was ready and willing to pay the full purchase price and all legal fees, but the officers refused to accept any payment; that he was informed before he went upon the land that the land had been located as lieu lands, and was claimed by other parties, but that their titles were irregular and fraudulent, and I refused to respect them. My family resided on the place up to the time I offered to prove up; most of the
197 time since then we have resided on a rented place in the neighborhood of Compton, and am now living near Compton, but I have all the time cultivated and occupied from time to time the place in the controversy. I have never since my tender of proof lived a week consecutively on the land in controversy with my family. I don't remember that we ever staid there two nights consecutively; we were back and forth between this place and my place at Compton. I was there at one time since tender of proof for about eight days during harvest. The reason I was off the land so much was because I was compelled to support my family.

J. C. BRUSH was called as a witness and sworn, and testified that in 1876 the land was not improved and had any been used for pasturage; there were no trees or buildings or fences or any improvements when the defendant settled upon the land; it was vacant, no one there, nor any stock; it was in a state of nature; it had apparently never been used, except that stock had been run over it when there was feed.

Whereupon defendants rested their case as to defendant Frasher.

Plaintiff then called in rebuttal GEORGE HANSEN as a witness, who, being duly sworn, testified in substance as follows:

198 In 1868 I was employed as deputy United States surveyor, and as such surveyed the Sausal Redondo rancho.

Counsel for the plaintiff then asked him the following questions:

Q. By what authority did you survey said rancho?

A. Under instructions from the United States surveyor general.

Q. Are these the instructions that you received in relation to that survey (showing paper)?

A. Yes, sir; these are the instructions under which I acted.

Counsel for the plaintiff then offered in evidence an order of the United States Surveyor General Upson, under date of February 7th, 1868, directed to Geo. Hansen, United States deputy surveyor, directing him to survey the Sausal Redondo Rancho.

To the introduction of which counsel for the defendant objected, on the ground that the same was irrelevant and inadmissible, and as possessing interlineations in a material part without any notice of the same being made in the margin or before signing. Whereupon the court directed counsel to inquire of witness about the interlineations. Counsel for plaintiff then asked:

199 [Q.] Was this document received by you in due course of your business as deputy United States surveyor?

A. Yes, sir.

Q. Do you know anything about the interlineation; was it in that condition when you received it?

A. I received it in that condition. It was evidently made by the man who wrote it.

Whereupon the court overruled the objection and admitted the document in evidence; to which ruling counsel for the defendant then and there, in due form of law, excepted; which said letter is in the words and figures following, to wit:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL., *February 7th*, 1868.

SIR: With this I forward a contract for the subdivision of the townships below designated, viz., T'ps 2 and 3 S., R. 13 W., and T'ps 2 and 3 S., R. 14 W., San Bernardino meridian. In making the survey of these townships you will set off, within the boundaries of the latter, the line of five square leagues in satisfaction of the grant of Sausal Redondo, confirmed to A. Y. Abila, in accordance with the accompanying instructions and the 8th section of the act
200 of Congress, approved July 23d, 1866, entitled "An act to quiet land titles in California."

Very respectfully,

L. UPSON,
U. S. Sur. General.

GEORGE HANSEN, Esq.,
U. S. Dep. Sur., Los Angeles, Cal.

Counsel for the plaintiff then offered in evidence, in connection with the foregoing, a letter of instructions from Upson, United States surveyor general, directed to George Hansen, dated February 7th, 1868, reciting that an application having been made for the survey of the said rancho, that under the act of Congress of July 23d, 1866, he should go and survey the rancho.

To the introduction of which counsel for the defendant objected, on the ground of its being irrelevant and inadmissible; which objection was by the court overruled and said document received in evidence; to which ruling counsel for the defendant then and there, in due form of law, excepted.

Which said document is in the words and figures following, to wit:

201 U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *Feb'y* 7, 1868.

SIR: Whereas, in the claim of Antonio Y. Abila to the tract of land hereinafter described, the U. S. district court for the southern district of California has affirmed the decision of the board of land commissioners, and notice is given by the Attorney General of the United States that no appeal will be further prosecuted therein. I have thought proper to appoint you my deputy in this special case for the execution of the final survey thereof. The decree of court above referred to confirms the lands known by the name of "Sausal Redondo" and "Guaspita," being the same lands granted by J. B.

Alvarado, May 20, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanied his original petition to the governor for the said lands, reference being had for a more particular description to the said original grant of said lands and the said map belonging thereto, filed in this cause and copied in said transcript. Provided that the lands contained within said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity and no more within said boundaries; but if a less quantity be contained within said boundaries, then confirmation
202 is hereby made for such less quantity. The original grant in this case described the land as follows:

1st. There is conceded to the citizen Antonio Igno Abila the tract of land called "Sausal Redondo" and "Guaspita," which he actually occupies, etc., without prejudice to the pasture lands of the city, as it has not marked out the commons ("Ejidos.")

2nd. That if the land to which reference is made in the foregoing articles should be comprehended within the Ejidos, of which mention is made, the grantee shall be subject to pay the ground rent which may be imposed on it.

A copy of the map referred to is herewith given you. No application having been made for the survey of this rancho within ten months after the passage of the act of Congress approved July 23rd, 1866, entitled "An act to settle land titles in California," you are hereby instructed to set off the same as contemplated by said act. The map or diseño is, by decree of court, the governing paper; it contains, according to scale thereon, about five square leagues. The petition to the board of land commissioners was for that quantity. The "Guaspita" is the portion bordering on the "Ballona" Rancho. You will retain the three boundaries called for in the diseño, viz., the Ballona, Mar, and San Pedro, and after correcting the
203 "Aguajeda Centinella," in accordance with the views of the office, adopt the southern line thereof as the line of this rancho, and extend the eastern or closing line so far east as to embrace the old house of Abila near the spring of Centinella.

Very respectfully,

L. UPSON,
U. S. Surveyor General.

To GEORGE HANSEN, Esq., *U. S. Deputy Surveyor.*

Witness further testified that the above instructions were received in the regular course of his business as deputy United States surveyor, and that he surveyed said rancho under and in pursuance of said instructions. Witness was shown the map of Thompson's survey, heretofore introduced in evidence, and asked if that was his survey, to which he answered: "No, sir; that is the survey of Mr. Thompson, containing 11 leagues." Witness was shown map and patent, which was already introduced in evidence on the part of defendant, and asked if that was his survey, to which witness replied that it was, and that he made said survey in pursuance of the instructions above stated, and at the date as shown upon said map.

Upon cross-examination witness testified as follows:

204 Q. When you say that it is the survey, are you aware that there were some corrections made in the western and northern boundaries, after the figures went out of your hands?

A. Later, after this survey was made, upon application of Mr. Burnettt, I recollect there was a little alteration to make in a tringular piece up here.

Q. How late was that made?

A. That I don't know.

Q. As late as 1871, or as late as 1872?

A. I can't recollect that.

Q. 1872, I think?

A. There was this—there was the Rancho Centinella, and this the Sausal Redondo joined (witness showing upon the map), and in the survey there was a little strip left out, a triangular piece.

Q. That was on the southwest?

A. It was on the northwest corner of the Centinella Rancho.

Q. Southwest of the Sausal Renondo?

A. No, near the northern boundary of the Sausal Redondo, adjoining the Bellona, and on the northwestern corner of the Aguaje de Centinella; a few acres or so.

Q. Then, Mr. Hansen, the survey you made in 1868 was modified to some extent, was it not, to include more land?

A. No; the survey was not modified; he made a petition that an error was committed, and they gave him that piece in addition.

205 Q. What did I understand you about that—that the patent issued for just the exact quantity of land that you surveyed in 1868, or was it modified a little seven years after?

A. I don't know anything about that patent; the patent is based on my survey; what I want to say is, I didn't get the survey to modify it; I made my survey; it was accepted; later, I don't know whether it was before or after the issuance of the patent Mr. Burnett discovered that there was a triangular piece of a few acres that separated his two ranchos where they should come together, and he petitioned for them; made application there to the proper authorities, and he got it.

Q. Who put that in—you, in your survey, or the surveyor general?

A. I don't know; in Washington they did it.

Q. Somebody did it, did they?

A. In Washington I believe they did do it.

Q. Then that is in the patent now?

A. I don't know whether it is an addition to the Rancho Sausal Redondo, or whether it is an addition to the Rancho Centinella, or if it is a gift of a piece or a sale of a piece of land. He may have got it of the Government and paid for it. I only know this fact: That that triangular piece was not in the two ranchos; in neither of them.

Case closed as to the defendant Frasher.

206 The court proceeded to try the issues made in said case as to George C. Brush, who claims the southwest ¼ of section 25, township 2 south, range 14 west, San Bernardino meridian.

The following stipulation was made by counsel in open court and entered of record herein :

It is stipulated by counsel in addition to the patent from the State of California to W. S. Rosecrans, which is now offered in evidence and is in the usual form, bearing date the 21st day of April, 1874, and purports to convey to Rosecrans the land claimed by the defendant Brush, that the entries and records of the United States land office of Los Angeles, already offered in evidence, shall be considered as received in this case, with all the endorsements ; also the explanatory evidence given by Register James, and all the record evidence of said office heretofore offered by plaintiff, so far as the same is applicable ; also the evidence of J. D. Bicknell as to the value of the rents and profits subject to the same objections, rulings, and exceptions as were made on the offer of the same evidence heretofore introduced in this case as to the defendant Frasher.

Counsel for the plaintiff then offered and read in evidence from the United States Land Office, listing the S. W. ¼ of section 25, township 2 south, range 14 west, San Bernardino meridian, to the
207 State of California, which said list was certified by the Commissioner of the General Land Office, under date of November 23d, 1871, a copy of which said list is hereto attached and made a part hereof, and marked Exhibit "C."

J. D. BICKNELL also testified in addition to the testimony before given, that the lands claimed by the defendant Brush had been leased, and before the commencement of this action the tenants had surrendered the lease and delivered possession to the plaintiff.

It was further stipulated in open court, and entered of record, that the deed from W. S. Rosecrans to M. J. O'Connor, the plaintiff herein, which purports to convey the lands in controversy, and all other record evidence heretofore introduced by the plaintiff, so far as the same affects the land claimed by the defendant Brush, shall be received in evidence, subject to the same rulings, exceptions, and objections as in the case of defendant Frasher.

Whereupon the defendant rested.

It was then stipulated in open court, and entered of record, that all the evidence, oral and of record, offered on part of the defendant Frasher, should be considered as evidence in this case so far as the same is applicable to the *locus in quo*, subject to the same objections, rulings, and exceptions and motions as made in that case.

208 The defendant then offered in evidence the affidavit of Sylvester Rogers, made and filed in the office of the county recorder of Los Angeles county, California, on the 12th day of March, 1868 (the only affidavit ever filed therein by said Rogers), and endorsed on the following description of land, to wit:

Los Angeles county. Township 2, range 14, section 25, S. ½, containing 320. Located March 12th, 1868. Surveyed March 1, 1868,

by U. S. surveyor general. Filed March 12th, 1868. T. D. Mott, recorder, by S. H. Mott, deputy.

All of which was admitted against plaintiff's objections that the same was irrelevant, incompetent, and immaterial, plaintiff excepting to ruling of the court admitting same.

The defendant then offered in evidence the application of Sylvester Rogers to the State of California to purchase the land in controversy with other lands, dated March 12th, 1868, accepted April 20th, 1868, the State locating agent stating in his affidavit that said application was located on the 22nd of April, 1868, with
209 accompanying affidavits, certificates of approval, and endorsements thereon, and the deed from said Rogers to W. S. Rosecrans.

To the introduction of which the plaintiff objected, upon the grounds that the same was irrelevant, immaterial, and incompetent, and upon the further grounds that the defendant, by his answer, claiming the land as a pre-emptor under the laws of the U. S., is not in such privity with the title of the State of California as to be allowed to question the proceedings taken by plaintiff or his grantees to acquire the title from the State of California.

Which objection was by the court overruled, and said document admitted as evidence; to which ruling plaintiff excepted in due forn.

Said application, affidavits, certificates, and endorsements thereon was in the form of those of Robert Thompson, hereinbefore set out in full, except that it described the land claimed by defendant Brush, with other lands, and was dated and sworn to March 12th, 1868, and accepted April 20th, 1868.

Defendant then offered and read in evidence a deed from Sylvester Rogers to W. S. Rosecrans, dated March 12th, 1868, purporting to convey the land in question to W. S. Rosecrans; also the selection
210 and location of the land described in said application of Sylvester Rogers, by the State locating agent, April 22d, 1868, together with the acceptance and approval thereof on the same day by the register and receiver of the U. S. district land office of San Francisco, all of which are in same form as like papers set out in full hereinbefore in behalf of defendant Frasher, except as to dates and land described.

Also offered and read in evidence an application of W. S. Rosecrans to the State of California to purchase the land therein described; which said application is as follows:

(" *Grant of the 16th and 36th Sections.*") *Application for Location Under the State.*

(Location No. 921, B. 36.)

LOS ANGELES LAND DISTRICT, *August 25th*, 1869.

To JOHN W. BOST, *Surveyor General.*

I, W. S. Rosecrans, of Los Angeles county, State of California, do

hereby apply under the provisions of an act entitled "An act to provide for the manangement of sale of the lands belonging to the State," approved March 28, 1868, to purchase and locate the following-described land in Los Angeles county:

S. ½ of Sec. 25, T. 2 S., R. 14 W., San Bernardino meridian,
211 containing 320 acres, according to the returns of the United States surveyor general, and which I agree to accept in lieu of the full amount of 320 acres, for which I agree to pay to the State of California one dollar and twenty-five cents per acre, in gold or silver coin, in the following manner, viz: Twenty per cent. of the purchase money, together with interest on the balance at the rate of ten per cent. per annum, in advance, from the date of approval of the location in the surveyor general's office.

This location has been made by me in lieu of W. ½ of sec. 16, T. 4 S., R. 5 W., San Bernardino meridian, which is in a private grant.

W. S. ROSECRANS.

Affidavit of Loation.

STATE OF CALIFORNIA, *County of San Francisco*:

(Location No. 36. Los Angeles land district.)

I, W. S. Rosecrans, of Los Angeles county, State of California, being duly sworn, depose and say: That I am a citizen of the United States and a resident of the State of California, of lawful age; that there is no improvement of any kind on said land other than mine.

Witness my hand. W. S. ROSECRANS.

212 Subscribed and sworn to before me, this 25th day of August, 1866.

[SEAL.] W. H. CHEEVERS,
Notary Public.

I, Robert Gardner, surveyor general of the State of California, do hereby accept the above offer, under the following conditions: That if such location be made and approved by the United States, it shall be for the use and benefit of the applicant on his complying with all the conditions and provisions of the act for the location and sale of lands belonging to the State, approved March 28th, 1868.

ROBERT GARDNER,
Surveyor General.

Surveyor general's office.

Grant of the 16th and 36th Sections for School Purposes.

STATE OF CALIFORNIA, OFFICE OF SURVEYOR GENERAL,
SACRAMENTO, *Feb.* 10, 1872.

(Location No. 36.)

I hereby certify that in accordance with the provisions of an act, entitled "An act to provide for the management and sale of the lands belonging to the State," approved March 28th, 1868, I have located

as a portion of the school lands 320 acres of public land in
213 the county of Los Angeles, at the request and for the use of William S. Rosecrans. Said land is described as follows:

S. ½ of Sec. 25, T. 2 S., R. 14 W., S. B. M.
Taken in lieu of——

This location has been made by the then locating agent in the name and for the benefit of the State of California, at the Los Angeles district in the city of Los Angeles, and with the consent of list No. 1 of said district, bearing date the 24th day of November, A. D. 1871, and the same is entered and numbered upon my register of locations.

The said location is hereby approved, and the treasurer of Los Angeles county shall receive in payment therefor, from William S. Rosecrans, $108\frac{45}{100}$ dollars, within fifty days from the date of the surveyor general's approval, being twenty per cent. of the purchase money, and interest on the balance, in advance, at the rate of ten per cent. per annum from the date of the approval of the location in the surveyor general's offic to January next.

ROBERT GARDNER,
Surveyor General.

Certificate issued No. 4601, April 18th, 1872. Patented April 21st, 1874. Grant of the 16th and 36th sections for school pur-
214 poses. Los Angeles land district. Location No. 921, B 36. San Bernardino maridian. Township No. 2 S., range No. 14 W., section 25, S. ½. Taken in lieu of west ½ of section 16, in township No. 4 S., range No. 5 W., San Bernardino meridian. Containing 320 acres. In lieu of 320 acres. Located for Wm. S. Rosecrans. Received and filed August 27th, 1869. Approved February 10th, 1872. Robert Gardner, surveyor general.

Defendant then offered in evidence the plat of survey of Rancho Sobrante San Jacinto, together with the certificate of Secretary of Interior attached thereto, that the survey of said grant has not been finally confirmed, for the purpose of showing that the W. ½ of Sec. 16, T'p 4 S., R. 5 W., S. B. M., in lieu of which the land in dispute was selected, is included within the exterior limits of a Mexican grant, the survey of which has not been finally confirmed, and had not been at the time of the selection and listment.

215 To the introduction of which plaintiff objected, upon the grounds that the same is irrelevant, immaterial, and incompetent.

Which objection was by the court overruled, and the same admitted as evidence; to which ruling plaintiff excepted.

It appears by said map and the entries therein, and the certificate of the Commissioner of the General Land Office, that the land, in lieu of which the land in question was selected, is included within the exterior limits of a Mexican grant, the survey of which has not yet been finally approved.

Plaintiff objects to the same as incompetent, irrelevant, and immaterial. Objection overruled. Plaintiff excepted.

The defendant, J. C. Brush, was introduced as a witness and duly sworn, and testified in his own behalf to all the facts necessary to qualify him as a pre-emptor under the laws of the U. S. That he settled on the land in June, 1876; has resided thereon ever since, except nine or ten months, when he resided elsewhere, and while so residing away from the land they went there as much as a week at a time. He claimed this land to be his home all of the time. He had no other home than the land after he settled there in 1876.

He filed his declaratory statement with the register and
216 receiver of the U. S. land office at Los Angeles, California, soon after the time he went on the land, and paid said officers $5. Some seven or eight months afterwards he tendered to the same officers final proof and full payment for the land, together with all legal fees. That said proofs were then and there reduced to writing in the usual and due form, and were sworn to before said officers, and were deposited and left then and there with said register and receiver, but they refused the payment of the money, and that from said refusal and ruling he appealed to the Commissioners of the General Land Office. Had built a house and made other improvements, and had cultivated the land and made full compliance with the pre-emption laws before he made said proof and tendered payment for said land. That he knew when he entered upon the land that it was claimed by Rosecrans under a title from the State of California. That the same had been used by other parties for grazing purposes. At the time he entered upon the land there was an artesian well on the land flowing water—no one residing on the land—and at the time he entered there was no one in possession of said land; no house or any building of any kind; no signs of any cultivation; no fence, or trees, or stock of any kind there. The land was vacant land, unimproved and unoccupied, and he supposed that it was Government land, open for settlement and pre-emption.

217 It was stipulated that the same evidence introduced in rebuttal in this case as to defendant Frasher shall be considered as introduced and admitted in rebuttal as to defendant Brush.

The court thereupon proceeded to try the issues made by the answer of defendant Dotson to plaintiff's complaint.

Plaintiff introduced in evidence the township plat tract book, heretofore introduced in this case, and also the list from the General Government to the State of California, hereto attached, which purports to list the land claimed by the defendant to the State of California, and also a patent from the State of California to W. S. Rosecrans, dated April 21st, 1874, which patent is in usual form, and purports to convey the land in controversy with other lands to said Rosecrans; also deed from said Rosecrans to the plaintiff hereinbefore introduced, which purports to convey this land with other lands to the plaintiff.

It was stipulated that the evidence of J. D. Bicknell, heretofore given in this case as to value of rents and profits and prior possession, shall be deemed as taken as to this defendant, and that all the evidence, oral and documentary, heretofore introduced in this case,

shall be received as evidence as to defendant Dotson, so far as the same is applicable, subject to the same objections, rulings, and exceptions heretofore made

218 Defendants offered in evidence the applications of Andrew J. Bowman and M. S. Loomis to purchase the lands in controversy of the State of California, said application being dated March 6th, 1868, together with accompanying affidavits, certificate of acceptance, and of location, with endorsements thereon.

To the introduction of which the plaintiff objected on the grounds specified in the objections to like documents, in the case of Frasher and Brush. Which objection was by the court overruled, and the same was admitted.

To which ruling plaintiff excepted.

Said application was in same form as application of Robert Thompson, hereinbefore set out in full, except that they described the land claimed by defendant Dotson, also same affidavits, certificates, and endorsements, in form different only as to dates, names, and land described.

Defendant then offered in evidence the affidavits of M. S. Loomis and A. J. Bowman, filed in the recorder's office of Los Angeles county, a copy of which accompanies application, being the only affidavits filed therein and endorsed on a description of land, not specifying what township or range. Also a map of the San Jacinto Viejo, with certificate of the Secretary of the Interior attached

219 thereto, that the said Rancho is still unsurveyed, for the purpose of showing that the land in lieu of which the land in question had been selected, was not within the exterior boundaries of a Mexican grant, the final survey of which had not been made; the land in lieu of which the land in question was selected being within the exterior limits of said grant.

To the introduction of which plaintiff objected, upon the grounds that the same was irrelevant, immaterial, and incompetent. Which objections were by the court overruled and the same admitted.

To which ruling the plaintiff excepted.

By said map it appeared that at the time of the selection a survey had been made of said rancho, and that the lieu was included within the limits as surveyed. The certificate is as follows:

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 19, 1877.

MESSRS. LUCE, HOLCOMB & JOHNSON,
Attorneys-at-Law, Washington, D. C.

GENTLEMEN: In compliance with the request contained in your letter of the 10th inst., I enclose herewith certified copies from the files and records of this office with the following:

220 First. Plat of the survey of the Rancho Sausal Redondo.

(Here follows a list of documents furnished, with a statement of facts in answer to the inquires of the parties addressed, and closes with the following language): In the cases of the Ranches San Jacinto Viejo and Santiago de Santa Ana, no return of survey in

either of said cases have ever been made to this office by the surveyor-general.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

Defendants then offered the deed of Miles, Loomis, and Bowman to Rosecrans, of March 5th, 1868, and the selection and location of the land described in said application of said Miles S. Loomis and Andrew J. Bowman by the State locating agent, April 22d, 1868, together with the description and approval thereof on the same day by the register and receiver of the U. S. district land office at San Francisco, all of which are in the same form as like papers set out in full hereinbefore in behalf of defendant, Frasher, except as to dates and land described, and patent to Rosecrans; also deed of Rosecrans to plaintiff heretofore offered by plaintiff, and also the application of W. S. Rosecrans to the State of California to purchase said land, which is in same form as the application hereinbefore set out in full.

221 ISAAC DOTSON, the defendant, was sworn in his own behalf, and testified substantially as follows:

I went on the land in April, 1866, and tendered my declaratory statement to register of land office, and paid him the fees. I don't know what he did with it; about six or seven months after I went, I went to the land office and deposited my proof and payment; took two witnesses; I tendered the proof and payment; he did not accept the money; I suppose the matter is now pending before the Department. (Witness testified to all the facts necessary to qualify him as a pre-emptor.) Built a small house, planted trees, sowed some grain; land was unimproved and unoccupied and uninclosed when I went there; I have cultivated about five acres.

On cross-examination, witness testified that he had not been living on the land ever since his entry; that he had lived in the city; that his family had resided in the city most of the time; I don't know that my wife ever remained with me a week at a time on the claim; after the tender of my proof and payment I resided with my wife and mother in the city most of the time; I have not seen the claim for about three months; my house has been removed; I put in no crop this year; I relied upon my volunteer crop; when I went on the land I knew that it had been claimed by parties holding under the State. Witness

222 also stated that he was in poor health, and was compelled to leave the land for his health, and to get food for his family; that he took his witnesses to the land office at the time he offered to make payment for said land, and after he had resided upon the land six months, and then and there reduced their evidence to writing, and the same was sworn to before the register and receiver of said U. S. district land office, and that he did then and there deposit with said officers the usual and full and complete proof of his compliance with the pre-emption laws of the United States, and tendered to them full payment of said land, together with all legal fees.

Defendant rests his case.

It was stipulated that the evidence heretofore introduced in rebuttal in this case as to defendant Frasher shall be received in this case as to defendant Dotson, subject to the same objections, rulings, and exceptions as before taken.

J. C. BRUSH was sworn as a witness in rebuttal, and testified that he lived near the place claimed by Dotson; that the house of Dotson had been removed for three or four months; that he had not seen Dotson in the place for about a year; that he never saw Mrs. Dotson on the place, yet she may have been there, and I not know it.

The court then proceeded to try the cause as to the defendant Somes.

223 Plaintiff offered in evidence the township plat and tract book records of the U. S. land office, heretofore offered, and the list listing the lands claimed by the defendant to the State of California, dated November 23d, 1879, and patent from State of California to W. S. Rosecrans, dated April 21st, 1874, which patent is in usual form and purports to convey the land in question, and deed of W. S. Rosecrans to the plaintiff, heretofore offered in the cause, whereby plaintiff purported to convey said lands to plaintiff.

And it was stipulated that the evidence heretofore offered in this case, oral and record, shall be deemed as offered and received as to defendant Somes, so far as the same is applicable, subject to the same objections, rulings, and exceptions heretofore made.

Plaintiff rests.

Defendant offered in evidence the application of Frank M. Adams to purchase of the State of California the land in question, together with the certificates of acceptance and location, and all endorsements thereon, and the affidavit filed in the office of the recorder, with the endorsements thereon.

To the introduction of which plaintiff objected upon the same grounds set forth in the objections made to like documents offered as to the other defendants herein.

224 Which objections were by the court overruled, and the same admitted. To which ruling plaintiff excepted.

Said application was in the same form as the application heretofore set out in full, except the description of land and the dates therein, and dated March 6th, 1868, that the description of land on which the affidavit filed in the recorder's office is endorsed did not specify what township or range.

Defendant then offered in evidence the selection and lists resulting from said application, and patent from the State of California to Rosecrans of said lands, and the application of W. S. Rosecrans, dated August 25, 1867, which is in the same form as that of like date heretofore set out in full; also patent of the Rancho Sausal Redondo, to show the condition of the land in lieu of which the land in question was selected, the lieu used being included in said Rancho.

To all of which plaintiff objected, upon the grounds that the

same was irrelevant and immaterial and incompetent. Which objection the court overruled, and the same was admitted as evidence; to which ruling plaintiff excepted.

Defendant then introduced deed from Frank Adams to Rosecrans, dated March 5th, 1868, and the deed heretofore offered by plaintiff from Rosecrans to plaintiff.

225 W. T. SOMES was called as a witness in his own behalf and duly sworn, and testified substantially as follows:

Testified to all the facts necessary to constitute him a qualified pre-emptor; that he settled upon the land in spring of 1876 in good faith, built a home, and made some improvements. The land was vacant, without any improvements of any kind, and not in the possession of any person when I settled there. I remained there until I was driven off by other parties, who claimed that they had rented the land; could not cultivate the land, as it was too dry. That he went to the land office and offered to file his declaratory statement, and paid the fees. He left the declaratory statement with the officers of land office. The register refused to allow the filing, and I appealed to the Commissioner. That six or eight months afterwards he took his witnesses and went to the land office and tendered his final proof, and deposited the usual and full proofs in writing of his full compliance with the pre-emption laws, duly sworn to before the register and receiver of said office with said officers, and tendered all legal fees and full payment for the land, which was also refused, and he appealed, and the same is now pending in the Land Department.

226 On cross-examination, witness testified that after he had been on the land six or eight months a man larger than himself came and said that he had rented the land and that he was going to have it, and thrust his fist in his face, and that he left there; since the tender of his proof and payment in U. S. land office had never resided on the land a week continuously; after he was driven off he never went back to remain over night; that he had been absent from the State more than six months, and had never tried to live on said land since his return to the State.

It was stipulated that the evidence of Hanson and the documentary evidence heretofore introduced shall be deemed in evidence as to defendant Somes, subject to the same objections, rulings, and exceptions.

J. C. BRUSH was introduced as a witness in rebuttal, and testified that he lived near the land claimed by Somes. That he had not seen Somes on the land for the last two years, and that there had not been a house on the land for a year and a half. That if Somes had, during that time, lived there he would have known it.

Case closed as to defendant Somes.

It was stipulated that Mr. Gould would testify, if sworn, to the same statement of facts in the case of Brush and Dotson as testified

to in the case of Frasher, as to application to purchase of
227 the State of California, subject to the same objections, rulings, and exceptions.

And it was further stipulated that Mr. James, register of the U. S. land office, would testify if called as a witness: That, upon the offer of defendants to file their declaratory statement, he refused to file the same, or to make entries upon the records of his said office, except that he kept a memorandum of the dates, names, and land, and that an appeal was taken in such case to the General Land Office, and, so far as heard from, at this time, the same are undetermined by Land Department; and the same is true also of the tender of proof made by each; and that he marked each tender "rejected because of State lieu land selection," and transmitted the same to the Commissioner of the General Land Office, at Washington, D. C.

Case closed as to defendant Somes.

The court then proceeded to try said cause as to defendant McClain, whereupon the plaintiff offered and used in evidence the lists heretofore offered and used in evidence, and the land claimed by defendant purports to be listed thereby to the State of California, by the General Government, with the other lands therein described, a copy of which list is hereto attached, marked Exhibit —; also offered and used in evidence patent from the State of California to W. S.
228 Rosecrans, dated April 21st, 1874, which patent is in usual form, and described the land in controversy with other lands; also deed from Rosecrans to plaintiff, heretofore introduced in evidence in this case, which conveys the land in controversy with other lands to plaintiff.

It was stipulated upon trial that the evidence of J. D. Bicknell, heretofore given, as to prior possession and rents and profits, be deemed as taken in this case and as applying to the lands claimed by the defendant McClain.

Plaintiff rested his case.

The following stipulation was then filed:

Stipulation of Defendant McLain.

Title of Court and Cause.

In the above cause it is stipulated that all the evidence, documentary and oral, heretofore offered in this cause by plaintiff or defendant, shall be considered as introduced as to the defendant McLain, so far as the same relates to the N. E. ¼ Sec. 26, Tp. 2 S., R. 14 W., S. B. M., the land claimed by defendant McLain, subject to the same objections, rulings, and exceptions heretofore made.

Further stipulated that McLain would testify, if present, that he tendered proof and payment for the land in U. S. land
229 office in the month of ——, 1877, and that the same was refused on the grounds that by the records of the U. S. land office said land appeared to be listed to the State of California, and was not open to pre-emption settlement, and said defendant appealed

to the Commissioner of the General Land Office from said action, and the same is still pending.

JOHN D. BICKNELL,
Attorney for Plaintiff.
H. T. HAZARD,
Attorney for Defendant.

Filed Nov. 7, 1879.

H. McLAIN was then introduced as a witness, and was duly sworn, and testified in his own behalf.

He testified to all the facts necessary to constitute him a qualified pre-emptor under the laws of the U. S. Also that he resided on the land most of the time since his entry thereon, and has cultivated and improved same since date of settlement, and has raised a crop of barley thereon, and usually took his family and lived on the land during the time of harvest.

EXHIBIT No. 1.

List No. 1 and 2 of indemnity school selection are headed as follows:

Exhibiting the tracts of public lands situated in the district
230 of lands subject to sale at Los Angeles, California, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the act of Congress approved February 26th, 1859, entitled "An act to authorize settlers upon sixteenth and thirty-sixth sections who settled before the surveys of public lands to pre-empt their settlement;" March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights, and for other purposes," and July 23d, 1866, entitled "An act to quiet land titles in California."

By list No. 2 it appears that the N. E. ¼, W. ½ of S. E. ¼ and S. ½ of S. W. ¼ of Sec. 23, T. 2 S., R. 14 W., S. B. M., in pursuance of application No. 1508, dated May 27th, 1868, was listed to the State of California in lieu of W. ½ of Sec. 16, T. 9 N., R. 17 W., S. B. M.

By list No. 1 the S. ½ of Sec. 25, T. 2 S., R. 14 W., S. B. M., in pursuance of application No. 1378, dated April 22d, 1868, was listed to the Ssate of California in lieu of W. ½ of Sec. 16, T. 4 S., R. 5 W., S. B. M.

Also the E. ½ of Sec. 26, T. 2 S., R. 14 W., S. B. M., in pursuance of application No. 1344, dated April 22d, 1868, was listed to
231 the State of California in lieu of E. ½ of Sec. 36, T. 4 S., R. 1 W., S. B. M.; and the W. ½ of said Sec. 26, T. 2 S., R. 14 W., S. B. M., in pursuance of application No. 1348, dated April 22d, 1868, was listed to the State of California in lieu of W. ½ of Sec. 36, T. 4 S., R. 1 W., S. B. M.

Also E. ½ of Sec. 27, T. 2 S., R. 14 W., S. B. M., in pursuance of application No. 1328, dated April 22d, 1868, was listed to the State of California in lieu of W. ½ of Sec. 16, T. 3 S., R. 14 W., S. B. M.

To list No. 1 is attached the following certificate:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, 23*d November*, 1871.

It is hereby certified that the tracts described in the foregoing list are embraced in the original lists now on file in this office of land selected as indemnity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of Congress of March 3d, 1853, February 26th, 1859, and July 22d, 1866.

It is further certified that the said tracts have been examined and compared with the township plats and tract books of this office, and that the indemnity is properly due to the township for which
232 selected, are found to be subject to selection and free from conflict, and it is, therefore, recommended that the list be approved, subject to any valid interfering rights which may have existed at the date of the selection.

(Signed) WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR, 24*th November*, 1871.

The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

(Signed) C. DELANO,
Secretary.

GENERAL LAND OFFICE, 23*rd of November*, 1871.

The tracts embraced in the following lists have been critically examined, and are found to be free from conflict, and enure to the State for the purpose indicated.

(Signed) M. MOBBY.
JAMES J. BARNES.

To list No. 2 are attached the same certificates in form, that of the Commissioner being dated May 29th, 1872, of Secretary, May 31st, 1872, and J. J. Barnes, May 29th, 1872.

Plaintiff here assigns and specifies the errors of law committed by the court, which were duly excepted to by the plaintiff.
233 In the trial as to defendant Frasher the court erred.

1st. The court erred in admitting as evidence the order of U. S. surveyor general to register of U. S. land office, dated June 26th, 1868, ordering the return of township plats, for the reasons and upon the grounds stated in the objections thereto.

2nd. The court erred in overruling the objections and admitting the evidence of H. C. Austin as to the boundaries of the Rancho Sausal Redondo and the claims made by the owners of said rancho, for the reasons and upon the grounds stated in the objections thereto.

3rd. The court erred in overruling the objections made to the instruction as evidence of the patent of the Rancho Sausal Redondo

and the map attached thereto, and admitting the same in evidence, for the reasons and upon the grounds stated in the objections thereto.

4th. The court erred in overruling the objection made and admitting as evidence copy of map of Thompson survey of the Rancho Sausal Redondo, made in July, 1868, for the reasons and upon the grounds stated in the objection thereto.

6th. The court erred in overruling the objections made thereto, and admitting as evidence the decision of Secretary of Interior,
234 dated August 31st, 1871, in regard to the survey of the Rancho Sausal Redondo, and the order of the Commissioner and opinion of Attorney General attached thereto, for the reasons and upon the grounds stated in the objections thereto.

6th. The court erred in overruling the objections and admitting as evidence the protest of the owners of the Rancho Sausal Redondo, dated May 23d, 1868, protesting against the Hancock survey of the Rancho Sausal Redondo, upon the grounds and for the reasons stated in plaintiff's objections thereto.

7th. The court erred in overruling the objection and admitting as evidence the patent of the Rancho La Liebre, upon the grounds and for the reasons stated therein.

8th. The court erred in overruling the objections and admitting as evidence the application of Robert Thompson to purchase the land in controversy of the State of California, dated May 1st, 1868, together with endorsements and the application of the State locating agent and certificate of register and acceptance of said application, upon the grounds and for the reasons stated in the objections thereto.

9th. The court erred in overruling the objection and admitting as evidence the affidavit of Robert Thompson, filed in the county
235 recorder's office, endorsed on a description of the land, upon the grounds and for the reasons stated in plaintiff's objection thereto.

10th. The court erred in overruling the objections made by plaintiff to the question propounded to witness Sylvester Rogers, about application made by him to purchase lands of the State, and making deed to W. S. Rosecrans, upon the grounds and for the reasons stated in the objection thereto.

11th. The court erred in refusing to strike out the evidence of witness Rogers, upon the ground expressed in the objections to the evidence.

12th. The court erred in overruling the objections made by plaintiff to the questions asked the witnesses, M. Teed and John Rhodes, as to applications made by them to purchase certain lands of the State of California and conveying the same to W. S. Rosecrans, and admitting as evidence, against the objections of plaintiff, the testimony of said Teed and said Rhodes, as to their locating certain lands, and conveying the same, upon the grounds and for the reasons stated in the objections made thereto.

13th. The court erred in overruling the objections made by the plaintiff and admitting as evidence the application of W. S.
236 Rosecrans to purchase lands of the State, dated April 22d, 1868, upon the grounds and for the reasons stated in the objections thereto.

14th. The court erred in overruling the objection of plaintiff, and admitted as evidence the several deeds executed by Rogers, Teed, Rhodes, and others to W. S. Rosecrans, upon the grounds and for the reasons specified in the objection thereto.

15th. The court erred in overruling the objections made by plaintiff and admitting as evidence the decision of the Secretary of the Interior of March 10th, 1876, in the case of G. B. Selbie, upon the grounds and for the reasons expressed in the objection.

16th. The court erred in overruling the objections made by plaintiff, and permitting Geo. W. Frasher and Will D. Gould to testify as to application made by Frasher to purchase the lands in controversy from the State of California.

Plaintiff here specifies and assigns the errors of law committed by the court which were duly excepted to by the plaintiff on the trial as to the defendant, George C. Brush.

1st. The court erred in overruling the objection and admitting as evidence the application of Sylvester Rogers to the State of
237 California to purchase the land in controversy, dated March 12th, 1868, for the reasons and upon the grounds expressed in the objection thereto.

2nd. The court erred in overruling the objection and admitting as evidence the plat of survey of the Rancho Sobrante San Jacinto, upon the grounds and for the reasons expressed in the objection.

And plaintiff here specifies and assigns the errors committed by the court, which were duly excepted to upon the trial, as to the defendant Dotson.

1st. The court erred in overruling the objections and admitting as evidence the application of Andrew J. Bowman and M. S. Loomis to purchase the lands in controversy of the State of California, dated March 6th, 1868, with accompanying affidavits, certificates, and endorsements, upon the grounds and for the reasons expressed in plaintiff's objections thereto.

2nd. The court erred in overruling the objections made by plaintiff and admitting in evidence the map of the Rancho San Jacinto, with certificate of the Secretary of Interior thereto attached, upon the grounds and for the reasons expressed in the objections made thereto.

Plaintiff here specifies and assigns the errors of law com-
238 mitted by the court, which were excepted to by the plaintiff on the trial of this cause, as to defendant Somes.

1st. The court erred in overruling the objections made by the plaintiff and admitting in evidence the application of Frank M. Adams to the State of California to purchase the land in controversy, with certificates and affidavits thereto attached, for the reasons and upon the grounds expressed in the objections made thereto.

Plaintiff here assigns and specifies wherein the evidence is insufficient to justify the finding and decision of the court in said cause.

Finding No. 1, as to the defendant Frasher, is unsustained by and repugnant to the evidence introduced in this cause, in this:

1st. It is there found that a survey of the Rancho Sausal Redondo was ordered and made in July, 1868, by Deputy Surveyor Thompson,

whereas there is no evidence that any other survey was ordered than the survey made by Hansen in February, 1868.

2d. It is found as a fact in said finding No. 1, that the grant owners protested against the survey of the Rancho Sausal Redondo made in February, 1868, reciting certain reasons for the protest, whereas there is no competent evidence that any protest was
239 ever made as found by the court, or that said protest recited the facts found by the court.

3d. It is found as a fact in said finding No. 1, that on October 31st, 1871, the Secretary of the Interior directed the township plats including the land in controversy to be returned to the U. S. land office, and that so much of the plats as includes the land in question be suspended whenever there is no competent evidence to sustain the same, and there is no competent evidence to sustain any of the facts found in said finding No. 1.

Finding No. 2 is unsustained and repugnant to the evidence in this cause, in this:

1st. Said finding is to the effect that W. S. Rosecrans procured for his own benefit a great number of men to make application to purchase the land in controversy from the State of California, and none of said applications were signed by any person, whereas the applications introduced in evidence by defendants show upon their face that they were signed and sworn to as required by law. And it further appears by the evidence that W. S. Rosecrans applied to the State of California to purchase the lands in controversy in August, 1869. That said application was approved and the land sold and patented to said Rosecrans in pursuance of said application.

240 2d. It is found in said finding No. 2 that all expenses attending the purchase of said lands were paid by W. S. Rosecrans, and that said application and deeds were void; wherein there is no evidence as to the expenses, and especially there is no evidence to prove that said transactions were fraudulent.

3d. It is found in finding No. 2 that the applicants to purchase said lands of the State of California were not informed and did not know the contents of their applications, and that they did not know the contents of the affidavit accompanying said applications, and that they were not sworn to affidavits connected therewith. Whereas there is no evidence proving or tending to prove such facts so found, but on the contrary, the said affidavits were taken before a notary public and duly certified by the seal of said notary, as it appears upon the face of said affidavits.

4th. It is further found in finding No. 2 that the application of ——— for the land described in the defendant's answer was fraudulent, whereas there is no evidence proving or tending to prove such fact.

5th. It is further found in said finding No. 2 that none of said applications were accompanied by any affidavit of three disinterested persons, stating certain facts set forth in said finding,
241 wherein it appears upon the face of said application that the same was accompanied by the affidavit of three disinterested parties, stating all the facts required by law.

6th. It is found as a fact, in said finding No. 2, that applicant omitted and neglected to file in the office of the county recorder of the county where the land is situate a description of the lands applied for, with a certificate of oath endorsed thereon, whereas there is no evidence to sustain said finding; but, on the contrary, it appears from the evidence that the same was duly filed as required by law.

Finding No. 3 is wholly unsustained and repugnant to the evidence introduced in this cause, in this:

1st. It is found as a fact in finding No. 3 that the township plat which includes the lands in controversy were recalled May 26th, 1668, whereas there is no competent evidence to sustain the finding, and the evidence relied upon shows that the same was made May 28th, 1868.

Finding No. 4 is wholly unsustained and repugnant to the evidence introduced in this cause, in this:

2nd. It is found as a fact in said finding No. 4 that the surveyor general never furnished the State authorities with a list in-
242 cluding the 16 and 36 sections used by the State locating agent as a basis in selection of said lands, whereas there is no evidence proving or tending to prove said finding.

3rd. It is further found in effect, in said finding No. 4, that the Commissioner of the General Land Office and Secretary of the Interior on the 23rd and 24th days of November, 1871, inadvertently and by mistake certified and listed said lands to the State of California, whereas there is no evidence whatever introduced in this cause proving or tending to prove said finding; but, on the contrary, said lists are shown to be regular in form and duly executed by the proper officers, and are now records of the Land Department.

4th. It is further found in effect, in said finding number four, that none of said lands embraced in said lists were of the character contemplated by any act of Congress or intended to be granted thereby; whereas it was proven that said lands are agricultural lands, and were listed as such.

Finding No. 5 is wholly unsustained and repugnant to the evidence introduced in this cause, in this:

1st. It is there found in effect that the lands were not legally surveyed on the 5th of August, 1869, and that the township plats
243 were not on file in the U. S. land office; whereas it is shown by the evidence, and hereinbefore found by the court, that said land had been surveyed and township plat filed before that date.

2d. It is there found in effect that Robert Gardner, on the 27th day of August, 1869, signing himself as surveyor general, accepted said applications long prior to his election, and that said applications were never accepted by any other person; whereas it clearly appears by the evidence that said applications were filed in office of surveyor general August 27, 1869, and approved by Robert Gardner February 10th, 1872.

Finding No. 9 is unsustained and repugnant to the evidence introduced in this cause, in this: That there is no competent evidence whatever proving, or tending to prove, that said defendant at

any time applied to the State of California to purchase said lands or any part thereof.

Finding No. 10 is unsustained and repugnant to the evidence introduced in this cause, as from the evidence it clearly appears that plaintiff is and was at the time of the commencement of this action owner in fee and entitled to the possession of said lands.

Upon the trial of the above-entitled cause the evidence introduced upon the trial as to defendant Frasher having been by stip-
244 ulation introduced respectively as to the defendants, Henry McLain, W. T. Somes, Isaac Dotson, and J. G. Brush, subject to the same objections, motions, rulings, and exceptions as made upon the trial as to defendant Frasher, and the court having found the same facts as to each defendant, excepting finding No. VII, plaintiff here assigns and specifies the same errors of law committed by the court upon the trial of this cause, and here repeats the same as to the several defendants, Henry McLain, W. T. Somes, Isaac Dotson, and J. G. Brush, as hereinbefore assigned and specified as to defendant Frasher, and plaintiff here assigns and specifies, and here repeats as to each defendant, Henry McLain, W. T. Somes, Isaac Dotson, and J. G. Brush, the same grounds wherein the evidence is insufficient to justify the findings and decision of the court as hereinbefore assigned and specified as to the defendant Frasher.

And plaintiff here further assigns and specifies that said finding No. VII, as found by the court, as to defendants Somes, Brush, Dotson, and McLean, are unsustained by the evidence, as it is found as a fact therein that the Rancho San Jacinto Viejo and the Rancho Sausal Redondo were not finally surveyed at the time of the selection of the lands claimed by the several defendants; whereas there is no evidence to sustain the finding as to the Rancho San
245 Jacinto Viejo, and it appears from the evidence that the Rancho Sausal Redondo was finally surveyed at the time of said selection.

Received copy of the foregoing statement on motion for a new trial, this 1st day of March, 1880.

H. T. HAZARD,
Attorney for Defendants McClain.
WILL D. GOULD,
JAMES H. BLANCHARD,
Attorneys for Defendants other than McLean.

I hereby certify that the statement on motion for a new trial herein has been settled, and the same is ordered to be engrossed, and be presented to court for certificate.

SEPULVEDA, *Judge.*

March 17th, 1880.

The statement as proposed by plaintiff, together with the amendments thereto proposed by the defendants, having been settled, and the same having been duly engrossed as above, I hereby certify that the above statement is correct, and the same is settled and allowed.

Dated March 19th, 1880.

SEPULVEDA, *Judge.*

Filed March 19th, 1880.

246 *Order Denying Motion for a New Trial.*

Title of Court and Cause.

FRIDAY, *March 19th*, 1880.

Motion for a new trial submitted and denied. Thirty days' stay.

Notice of Appeal.

Title of Court and Cause.

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State from the judgement therein made and entered in the said court as to each and all of the defendants, Geo. W. Frasher, J. C. Brush, I. Dotson, W. T. Somes, and H. McClain; the judgment as to defendant, Geo. W. Frasher, being entered on the 3rd day of February, 1880; the judgment as to defendant, J. C. Brush, being entered on the 31st day of January, 1880; the judgment as to the defendant, I. Dotson, being entered on the 3rd day of February, 1880; the judgment as to the defendant, W. T. Somes, being entered on the 9th day of February, 1880, and the judgment as to the defendant, H. McClain, being entered on the 31st day of January, 1880, said judgments being in favor of said defendants and against said plaintiff, and from the whole thereof; and also from the order denying said plain-
247 tiff's motion for a new trial, made and entered in said superior court on the 19th day of March, 1880, in this cause, as to each and all of said defendants.

Dated this 22nd day of March, 1880.

JOHN D. BICKNELL,
Attorney for Plaintiff.

To the clerk of said superior court and to Will D. Gould, James H. Blanchard, and Henry Hazard, attorneys for defendants.

Received copy of within, this 22nd day of March, 1880.

H. T. HAZARD,
J. H. BLANCHARD,
WILL D. GOULD,
Attorneys for Defendants Frasher, Brush, Dotson, and Somes.

Filed March 22nd, 1880.

Clerk's Certificate.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

I, A. W. Potts, county clerk and *ex-officio* clerk of the superior court in and for said State and county, do hereby certify that the foregoing transcript on appeal contains a full, true, and correct copy of each of the following documents on file in the above-entitled cause, to wit: "Complaint," "Answer of Geo. W. Frasher," 250 "Answer of J. C. Brush," "Answer of I. Dotson," "Answer of W. T. Somes," "Answer of Henry McLain," "Findings and

Judgment as to G. W. Frasher," "Findings and Judgment as to J. C. Brush," "Findings and Judgment as to I. Dotson," "Findings and Judgment as to W. T. Somes," "Findings and Judgment as to Harvey McClain," "Statement on Motion for a New Trial," "Order denying plaintiff's Motion for a New Trial," "Notice of Appeal."

And I further certify that a sufficient undertaking on appeal in due form has been properly filed within the time prescribed by law.

Witness my hand and the seal of said superior court hereunto affixed, this 22d day of March, 1880.

[SEAL.] A. W. POTTS, *Clerk*,
By A. NORTON, *Deputy Clerk*,

(Here follows diagrams, marked pp. 248–249.)

Clerk's Certificate.

In the Supreme Court of the State of California.

I, Frank W. Gross, clerk of the supreme court of the State of California, hereby certify that the within and foregoing printed transcript is a full and correct copy of the transcript furnished me by the appellant in the within-named action, wherein N. J. O'Connor is appellant and G. W. Frasher *et al* are respondents.

In witness whereof I have hereunto set my hand and the seal of said court, at Los Angeles, this 31 day of March, 1880.

[SEAL.] FRANK W. GROSS,
Clerk Supreme Court,
By JOHN O. WHEELER,
Deputy.

251 Rec'd copy, this 31st March, 1880.
H. T. HAZARD,
Attorney for Defendant, Henry McClain.

Service accepted by copy, this 31st day of March, 1880.
JAMES H. BLANCHARD AND
WILL D. GOULD,
Attorneys for Defendants, Frasher, Somes, Brush, and Dotson.

252 *Judgment.*

In the Supreme Court of the State of California. In Bank.

JANUARY 4th, 1881.

M. J. O'CONNOR, Plaintiff and Appellant,
vs.
GEO. W. FRASHER, W. T. SOMES, L. L. HOLBROOK, HENRY McCLAIN, R. Baldwin, S. H. Pitney, Isaac Dotson, and J. G. Brush, Defendants & Respondents. } No. 7093.

On appeal from the superior court in and for the county of Los Angeles.

And now, at this day, this cause being called, and having been

heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Sharpstein, J.; Thornton, J., McKee, J., McKinstry, J., concurring. Dissenting opinion, Myrick, J.

Whereupon it is adjudged and decreed by the court that the judgment and order denying a new trial of the superior court in and for the county of Los Angeles in the above-entitled cause, be, and the same is hereby, reversed with costs, and the court below is directed to enter judgment for plaintiff against the defendants Frasher, Brush, Dotson, Somes, and McClain.

253 *Opinion of the Supreme Court of the State of California, in Bank.*

In Bank. (Filed January 4, 1881.)

O'CONNOR *vs.* FRASHER. } No. 7093.

The plaintiff sues in ejectment for the recovery of the possession of the land described in the complaint. The conclusion at which we have arrived renders it unnecessary to consider anything beyond the uncontroverted facts found by the court below. The land which the plaintiff seeks to recover was sold and patented on the 21st day of April, 1874, by the State of California to one Robert Thompson, from whom the plaintiff deraigns his title through the mesne conveyance of one W. S. Rosecrans, whose conveyance to plaintiff is dated April 12, 1875. The land was listed to the State as lieu land, and the list certified by both the Commissioner of the General Land Office and the Secretary of the Interior. By the former on the 29th day of May, 1872, and by the latter on the 31st of May, 1872. The defendant entered upon the land on the 8th day of June, 1876, and tendered his filing thereon in the United States land office, with all legal fees, claiming the land as a pre-emptor, and on the 18th day of December, 1876, tendered his final proof and payment to the officers of the United States land office, which was refused, and an appeal was taken from the action of the officers of the local office to the Commissioner of the General Land Office, and the same is now pending. At some time in the year 1879 the defendant applied to the proper officers of this State to purchase said land from the State, and said application is now pending and undetermined.

From which it appears that the defendant's right to controvert the plaintiff's title is based solely upon the ground of a naked entry by the defendant upon the land more than two years after the State had sold and patented it to the plaintiff's grantor, and more than four years after the land had been listed by the United States to this State. Now, conceding that the facts alleged by the defendant are all true, and that the land was improperly listed to the State, and that the State improperly conveyed it to the plaintiff's grantor, and that the acts of all the officers who certified said list and issued

Judgment as to G. W. Frasher," "Findings and Judgment as to J. C. Brush," "Findings and Judgment as to I. Dotson," "Findings and Judgment as to W. T. Somes," "Findings and Judgment as to Harvey McClain," "Statement on Motion for a New Trial," "Order denying plaintiff's Motion for a New Trial," "Notice of Appeal."

And I further certify that a sufficient undertaking on appeal in due form has been properly filed within the time prescribed by law.

Witness my hand and the seal of said superior court hereunto affixed, this 22d day of March, 1880.

[SEAL.] A. W. POTTS, *Clerk*,
By A. NORTON, *Deputy Clerk*,

(Here follows diagrams, marked pp. 248–249.)

Clerk's Certificate.

In the Supreme Court of the State of California.

I, Frank W. Gross, clerk of the supreme court of the State of California, hereby certify that the within and foregoing printed transcript is a full and correct copy of the transcript furnished me by the appellant in the within-named action, wherein N. J. O'Connor is appellant and G. W. Frasher *et al* are respondents.

In witness whereof I have hereunto set my hand and the seal of said court, at Los Angeles, this 31 day of March, 1880.

[SEAL.] FRANK W. GROSS,
Clerk Supreme Court,
By JOHN O. WHEELER,
Deputy.

251 Rec'd copy, this 31st March, 1880.
H. T. HAZARD,
Attorney for Defendant, Henry McClain.

Service accepted by copy, this 31st day of March, 1880.
JAMES H. BLANCHARD AND
WILL D. GOULD,
Attorneys for Defendants, Frasher, Somes, Brush, and Dotson.

252 *Judgment.*

In the Supreme Court of the State of California. In Bank.

JANUARY 4th, 1881.

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vs.
GEO. W. FRASHER, W. T. SOMES, L. L. HOLBROOK, HENRY McCLAIN, R. Baldwin, S. H. Pitney, Isaac Dotson, and J. G. Brush, Defendants & Respondents. } No. 7093.

On appeal from the superior court in and for the county of Los Angeles.

And now, at this day, this cause being called, and having been

heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Sharpstein, J.; Thornton, J., McKee, J., McKinstry, J., concurring. Dissenting opinion, Myrick, J.

Whereupon it is adjudged and decreed by the court that the judgment and order denying a new trial of the superior court in and for the county of Los Angeles in the above-entitled cause, be, and the same is hereby, reversed with costs, and the court below is directed to enter judgment for plaintiff against the defendants Frasher, Brush, Dotson, Somes, and McClain.

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From which it appears that the defendant's right to controvert the plaintiff's title is based solely upon the ground of a naked entry by the defendant upon the land more than two years after the State had sold and patented it to the plaintiff's grantor, and more than four years after the land had been listed by the United States to this State. Now, conceding that the facts alleged by the defendant are all true, and that the land was improperly listed to the State, and that the State improperly conveyed it to the plaintiff's grantor, and that the acts of all the officers who certified said list and issued

the patent of said land should be revoked by the proper departments of the State and Federal Governments, the fact still remains that the plaintiff has a patent which is regular upon its face, and the proceedings resulting in it were the usual proceedings in such cases and regular in form. The questions whether the land was, or was not, public land, within the meaning of the acts of Congress granting lands to the State of California as school lands or State indemnity lands, or the survey thereof, was with or without the authority of law, were questions which it was the duty of the land officers to determine, and if they made a mistake in judgment their action was erroneous and not a mere nullity. (Dodge *vs.* Perez, 2 Sawyer, 645.)

"If the authority to issue the patent depends upon the existence of particular facts in reference to the condition or location of the property, or to the performance of certain antecedent acts, and officers having been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment, then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves. In such cases the parties without title cannot be heard at all, and the parties with subsequent title must seek their remedy by *scire facias*, or bill or information, to revoke the first patent or limit its operation." (Doll *vs.* Meador, 16 Cal., 325; Ah Yen *vs.* Choate, 24 Cal., 566; Frisbie *vs.* Whitney, 9 Wall., 187; Hutchings *vs.* Low, 15 Wall., 77.)

But it is unnecessary to cite authorities upon this point. When this case was here before (53 Cal., 435) the late court said: "Treating the whole pleadings (of the defendant) as a cross-complaint, the demurrer should have been sustained," and cited Thomas *vs.* Lawlor, (53 Cal., 405), in which the doctrine of Doll *vs.* Meador, *supra*, is clearly recognized and followed.

The judgments and orders denying a new trial are reversed, and the court below is directed to enter judgment for plaintiff against the defendants, Frasher, Brush, Dotson, Somes, and McClain.

SHARPSTEIN, J.

We concur:
THORNTON, J.
McKEE, J.
McKINSTRY, J.

254 *Dissenting Opinion.*

I dissent for the reasons hereinafter stated:

1. The lands in controversy are lands attempted to be located and patented as lieu lands, so called, and are within the exterior lines of what had been claimed to be the Rancho Sausal Redondo, a Mexican grant. At least two surveys of the grant have been made, and there was a controversy between the owners of the grant and others as to whether the lands involved in this suit and other lands were or were not to be included within the final survey and confirmation.

Not until 1875 was the survey of the grant finally approved by the Commissioner of the General Land Office, which survey excluded the lands from the grant. Previous to that time, as the controversy progressed, plats and surveys had been filed and withdrawn. Plaintiff claims title under a State patent. He was never in possession. In my opinion the State patent, issued before 1875, and based upon proceedings of the various land officers before 1875, is void, and can be questioned by any person in possession. Prior to 1875 the State had no title to grant, and the assumption by its officers of the power to grant and the location and patent were void facts.

2. The several defendants defend each in his own right. The court below found separately in regard to the defendants substantially as follows:

"That about the 6th day of March, 1868, W. S. Rosecrans procured for his own benefit a great number of men to make applications to purchase the lands from the State of California described in plaintiff's complaint; that said applications purported to have been made under the provisions of an act, entitled 'An act to provide for the sale of certain land belonging to the State,' approved April 27, 1863; and none of said applications were signed by any person.

"That each of said applicants conveyed by deed to one W. S. Rosecrans the lands for which he so applied; some of which deeds were made and executed immediately before, some at the time of, and others immediately after the applications were made as above. That neither the said applicants, nor any one in their behalf, ever paid the State of California for said applications or for the execution thereof, all expenses connected therewith being wholly borne by said Rosecrans. That the said applications and deeds were all one and the same transaction, and were wholly fraudulent and void *ab initio*, and were obtained in the behalf of said Rosecrans, who paid each applicant a sum of money therefor, and in fraud of the provisions of said act of April 27, 1863. That said applicants were not informed by said Rosecrans, or any other person, of the contents of said applications, and that they did not read the affidavits accompanying said applications, nor were they informed by any officers authorized to take acknowledgments, or any other person, of the contents thereof, and were not sworn to any oath or affidavits connected therewith.

"That the application of Robert Thompson for the land described in defendant's answer was one of said fraudulent applications, and was made May 1, 1868, for the benefit of said Rosecrans, and was fraudulent; that said application was presented to the State locating agent, and by him accepted and filed on the 1st day of May, 1868.

"That said application was not accompanied by an affidavit of three disinterested persons, stating, among other things, that said applicant was a resident of the State, and that the lands were unoccupied by any person except the applicant, as required by said act of April 27, 1863.

"That said applicant omitted and neglected to file in the office of county recorder of the county in which the lands were situated a description of the lands applied for, with a certificate of the oath or

affirmation indorsed thereon, as required by the 29th section of said act of April 27, 1863.

"That plats including these lands, purporting to be township plats, were made and filed for the first time in the United States land office at San Francisco, April 22, 1868; that said plats were recalled by the United States surveyor general May 26, 1868, and were never again filed in said land office.

"That by reason of said application, Leander Ransom, State locating agent of the State of California, on May 27, 1868, pretending to act under and by virtue of law, and in part satisfaction of the grant by the United States to said State of other lands in lieu of the 16th and 36th sections for school purposes, under an act of Congress approved March 3, 1853, entitled 'An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes,' and of an act of Congress approved July 23, 1866, entitled 'An act to quiet land titles in California,' selected and located the lands described in said application for the State of California.

"That the selection and location of said land was the result of and made in satisfaction of said application, and corresponded with it in number and in the description of the land applied for.

"That the United States surveyor general for the State of California never furnished the State authorities with a list or lists including any of the said 16th or 36th sections, or any part thereof, used by said State locating agent in said selection and location as a basis of selection, as required by section 6 of said act of Congress approved July 23, 1866.

"That thereafter, by reason of said application, selection, and location, to wit, on the 23d and 24th days of November, 1871, and long prior to the lapse of the ninety days after filing of the township plats, including said lands in the United States district land office, the Commissioner of the United States General Land Office and the Secretary of the Interior inadvertently and by mistake certified and listed said lands to the State of California, and that the lists including said lands were identical with said application, selection, and location in number, description of land selected, and none of said land thus selected was of the character contemplated by any act of Congress, or intended to be granted thereby.

"That on or about the 25th day of August, 1869, before said lands were legally surveyed, and when there was no township plat including said lands on file in the U. S. district land office, said W. S. Rosecrans made application to the surveyor general of the State of California, John W. Bost, to purchase and locate all of said described lands in the applications mentioned in the second finding, which were with them identical in description of land applied for, and the 16th and 36th sections used as a basis of said application.

"That on the 27th day of August, 1869, Robert Gardiner, signing himself as surveyor general of the State of California, accepted said application at a time long prior to his election or qualification for

said office, and that said application was never accepted by any other person.

"That thereafter, to wit, on the 10th day of February, 1872, Robert Gardiner, then surveyor general of the State of California, basing his approval upon the recital therein, to wit, 'that the location has been made by the then locating agent in the name and for the benefit of the State of California, at the Los Angeles district, in the city of Los Angeles, with the consent of list No. 1 of said district, bearing date the 24th day of November, 1871,' approved each of said applications.

"That thereafter, and in consequence thereof, certificates of purchase and patents issued from the State of California for said land to W. S. Rosecrans.

"That neither the plaintiff, M. J. O'Connor, nor said Rosecrans, nor the said Robert Thompson, nor either of them, were ever in the actual possession of said lands, or any part thereof, or ever had any improvements thereon, or ever had any portion thereof fenced or enclosed in any way, and that all of said lands are rich agricultural lands, and that the plaintiff and his grantor have every year, since 1872, leased the land in controversy to persons who have used the same for grazing purposes, pasturing sheep thereon, and have so used it until the defendant entered thereon.

"That the plaintiff, M. J. O'Connor, bases his claim to said lands, and in no other way than by a deed to the same from W. S. Rosecrans, and the above procedure herein found.

"That the township plats, including said lands, were, on the 21st day of November, 1871, filed for the first time in the United States district land office at Los Angeles, California.

"That at the time of making said application and selection the Rancho La Liebre, within the limits of which the W. ½ of section 16, T. 9 N., R. 17 W., S. B. M. was situated, which was the basis of said application and selection in finding second above, had been finally surveyed and located by the proper authorities of the United States, and said lands were, at the time of said application and selection, actually lost to the State of California as school lands by reason of such final survey.

"That said defendant, George W. Frasher, was a duly qualified pre-emption settler, and fully entitled to the privileges of the pre-emption laws of the United States, and settled upon said tract of land claimed by him, as above found, in good faith as such settler, and performed thereon all acts required by said pre-emption laws to entitle a person to pre-empt public land.

"That on the 8th day of June, 1876, the defendant applied to the register and receiver of the U. S. district land office at Los Angeles, Cal., to file his declaratory statement in due form upon said land, as required by the laws of the United States. That at the time of making said application the defendant was living on said land with his family, and had made valuable improvements thereon. That on said 8th day of June, 1876, said defendant did tender and deposit his declaratory statement in due form with the register and

receiver of the proper U. S. district land office, together with all legal fees therefor.

"That afterwards, to wit, on or about the 18th day of December, 1876, said defendant made the requisite and usual proofs before the register and receiver of said U. S. district land office of his qualifications and his settlement, and his improvements on said tract of land, and tendered the same in writing and deposited the same with said register and receiver, and at the same time tendered the full Government price therefor, with all legal fees and commissions, and requested that he be permitted to enter said land, at said office, under said pre-emption laws, and that said register and receiver refused to approve said claim of the defendant, and refused to permit him to enter said lands under said pre-emption laws, and refused to receive the purchase price tendered, and still so refuses.

"That said defendant duly appealed from said action of the register and receiver, and that said claim is now pending before the U. S. Gerreral Land Office.

"That on the — day of ——, 1879, said defendant duly applied to the proper authorities of the State of California to purchase said land from the State, and that said application is now pending and undetermined."

I agree with the court below in its conclusions of law as follows: "That none of said lands thus included within the boundaries or exterior limits of the private grant, to wit, the Rancho Sausal Redondo, were public lands within the meaning of the acts of Congress granting lands to the State of California as school lands or as State indemnity lands, until the said claim covering them was finally decided to be invalid, and all of such lands were thus excluded from any mode of acquirement. They were not in a condition to be applied for or acquired by individuals or selected by the State, and that the attempt of the surveyor-general to remove the reservation and to extend the public survey over said lands, and the filing of township plats including the same in 1868, was without authority of the law and was wholly void. The evidence does not warrant the conclusion that the survey of the Rancho Sausal Redondo in 1868 was made by Deputy Hansen under the eighth section of the act of Congress, 1866; on the contrary, the evidence shows that said survey was not made under said act or by authority thereof.

"That the defendant is in such privity with the United States, the paramount source of title, as enables him to attack the patent issued to plaintiff's grantors by the State for the land in controversy and upon which plaintiff rests his title in an action at law or equity.

"That the selection of said land was void, as having been made without authority of law, and, being void, the State had no title which it could convey to plaintiff's grantor; that said land was not intended to be granted by any law of Congress, and the listing of said lands to the State by the Commissioner of the General Land Office was null and void, and the patents from the State for said

lands are void, and the plaintiff has no title to said land or any part thereof.

"That an invalid State selection is no bar to the rights of a pre-emption or homestead settler, and that the tender of proof and offer of payment by the defendant for said land placed him in the same relation as if the defendant had been permitted by the Land Office to do what in this respect was offered to be done."

The judgment of the courts below in favor of defendants and the orders denying motion for new trial should be affirmed.

MYRICK, J.

Indorsed: Filed January 4th, 1881. F. W. Gross, clerk, by J. B. Martin, deputy.

255 *Petition for Rehearing in Bank*

In the Supreme Court of the State of California.

M. J. O'CONNOR, Appellant,
vs.
GEO. W. FRASHER *et al.*, Respondents. } 7093.

To the Hon. Supreme Court of the State of California:

Your petitioners respectfully represent that this case was decided by the court in banc on the fourth day of January, 1881, adversely to your petitioners, the respondents, and that no previous judgment has been rendered in the case, in either of the departments of this court.

Wherefore your petitioners earnestly request a rehearing of said case.

256 *Statement of Questions Involved.*

I.

Whether or not a listment of lands from the United States to the State of California as school lands, in lieu of the 16th and 36th sections, not lost to the State is void.

(Except in respondent Frasher's case, in which the basis of selection was actually lost to the State.)

II.

Whether or not a list embracing lands reserved at the time of the listment is void.

III.

Whether or not a list embracing lands not intended to be conveyed by the act of Congress of 1853, and the various acts amendatory thereto, giving to the State of California the lands in lieu of 16th and 36th sections as indemnity school lands and declared by a public statute, to wit, the act of August 3d, 1854, to be ab-
257 solutely void and to convey no title, right, or interest, gives to the State any right upon which a valid patent can be issued.

IV.

Whether or not qualified pre-emptors who have settled upon land in good faith, and who, in every way, have complied with the requirement of the pre-emption laws, but have been prevented from filing declaratory statements and entering the lands by the arbitrary refusal of the local land offices, against law and the established rules of the Interior Department, are in privity with the paramount source of title.

V.

Whether or not qualified pre-emptors complying with the requirements of the pre-emption laws of the United States are trespassers upon lands claimed under a void title.

VI.

Whether or not a suit in ejectment can be maintained upon a patent absolutely void.

258 *Reasons why the Case should be Reheard in Banc.*

I.

The lands in question, except in the Frasher case, were listed to the State of California in lieu of lands not lost to the State; the list was therefore void.

Rosencrans *v.* Douglass, 52 Cal., 213.
Act of Congress, Aug. 3d, 1854.

The list under this decision and act of Congress is not merely voidable; it is absolutely void.

II.

The lands embraced in the list were reserved from appropriation at the time the list was made, being included within the surveyed and claimed limits of a Mexican grant, to wit, the Sausal Redondo.

Huff *v.* Doyle *et al.*, 50 Cal., 16.

III.

259 The list conveyed no title to the State for the reason that it was void.

Rosencrans *v.* Douglass, 52 Cal., 213.

Therefore the State had no title which it could convey, and its patent is therefore void.

Rosencrans *v.* Douglass, 52 Cal., 213.

IV.

The defendants are not trespassers; their possession is permitted by the laws of the United States, and when protected by the law

becomes a legal right. Therefore they are in privity with the United States.

Hutchings *v.* Low, 15 Wallace, 77.
Kile *v.* Tubbs, 23 Cal., 431.
Terry *v.* Mayerle, 24 Cal., 609.
Robenson *v.* Forrest, 29 Cal., 317.
Rosencrans *v.* Douglass, 52 Cal., 213.

V.

The arbitary acts of the U. S. land officers in refusing defendants' filing and entry is contrary to the long established usage of
260 the Interior Department. The rule is that an invalid State selection is no bar to pre-emption.

Decisions of Secretary of the Interior in the cases of—

Selby *et al. v.* State of California, Copp's Land Owner, vol. 3, No. 1, p. 4, (April, 1876.)
Aurrecoechea *v.* State of California *et al.*, Copp's Land Laws, p. 225.
State of California *v.* Haile *et al.*, Copp's Land Laws, p. 324.
McClain *v.* Stanley, February 5th, 1875.

The lands in question were listed to the State while reserved from appropriation, and in lieu of lands not lost; the officers of the United States, therefore, had no authority to make the list, and this want of power may be shown in an action at law in ejectment.

Norton *v.* Nebraska, 21 Wallace, 660.
Erton *v.* Salisbury, 21 Howard, 426.
Sherman *v.* Buich, 3 Otto, 209.
Best *v.* Polk, 18 Wallace, 112.
Polk, Lessee, *v.* Wendell, 9 Cranch, 99.
Polk, Lessee, *v.* Wendell, 5 Wheat., 303.
Patterson *v.* Winn, 5 Wheat., 388.
Rice *v.* Railroad Co., 1 Black., 360.
261 Foley *v.* Harrison, 15 Howard, 433.
Wirth *v.* Branson, U. S. Sup. Cou't, October term, 1878.

All of the above cases are cases in ejectment.

A patent may be attacked collaterally:

1. When void on the face.
2. When issued in advance of legislation directing a disposition of the property described.
3. When issued by an officer who is not invested with power to sign the same.
4. When issued for an estate prohibited.

Churchill *v.* Anderson, Pacific Coast Law Jounrnal, vol. VI., page 418, No. 10.
Doll *v.* Meador, 16 Cal., 325.

No affirmative relief is now demanded under the pleadings. There is no cross-complaint.

No patent ever issued to Robert Thompson for any of the land in question, except the 80 acres claimed by Frasher.

The deed from Thompson to Rosencrans was made in fraud of the law, and one day prior to the date of his unsigned application,
262 and long prior to the survey of the land, Rosencrans thus fraudulently and in violation of the statutes of California, acquired more than 320 acres of land.

Respectfully submitted,

WILL D. GOULD AND
JAMES H. BLANCHARD,
Attorneys for Respondents, Frasher, Brush, Dotson, and Somes.

Indorsed: Filed January 19, 1881. F. W. Gross, clerk, by John O. Wheeler, deputy.

Service accepted by copy, this 19 day of January, 1881.
JOHN D. BICKNELL,
Att'y for Appellant.

263 *Order Denying Petition for Rehearing in Bank.*

In the Supreme Court State of California. In Bank.

M. J. O'CONNOR, Appellant,
vs.
GEO. W. FRASHER *et al.*, Respondent. } 7093.

Petition to hear cause in bank denied by the court.
Friday, January 28th, 1881.

264 *Bond on Writ of Error.*

In the Supreme Court of the United States.

GEORGE W. FRASHER, W. T. SOMES, HENRY MCCLAIN, ISAAC DOTSON, and JOEL C. BRUSH, Plaintiffs in Error,
vs.
M. J. O'CONNOR, Defendant in Error.

Know all men by these presents, that we, Melvin S. Fay and William Giller, are held and firmly bound unto M. J. O'Connor, said defendant in error, in the sum of ($500) five hundred dollars,
265 lawful money of the United States of America, to be paid to said M. J. O'Connor, his heirs, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of heirs, executors, and administrators, firmly by these presents.

Sealed with our seals; dated this 18th day of October, A. D. 1881.

Whereas said George W. Frasher, W. T. Somes, Henry McClain, Isaac Dotson, and Joel C. Brush, plaintiffs in error, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the State of California, in the cause entitled M. J. O'Connor, appellant, against George W. Frasher *et al.*, respondents:

Now, therefore, the condition of this obligation is such, that if the above-named George W. Frasher, W. T. Somes, Henry McClain, Isaac Dotson, and Joel C. Brush shall prosecute their said writ of error to effect and answer all costs and damages if they shall
266 fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

MELVIN S. FAY. [SEAL.]
WM. GILLER. [SEAL.].

Signed, sealed, and delivered in presence of—
WILL D. GOULD.

STATE OF CALIFORNIA, } ss:
Los Angeles County, }

Melvin S. Fay and William Giller, being duly sworn, each for himself deposes and says: That he is a resident and householder in said State of California, and is worth the sum of ($500) five hundred dollars, lawful money of the United States of America, exclusive of property exempt from execution and over and above all debts and liabilities.

MELVIN S. FAY.
WM. GILLER.

Subscribed and sworn to before me, this 18th day of October, A. D. 1881.

[SEAL.] JAMES H. BLANCHARD,
Notary Public, Los Angeles County, California.

267 I hereby approve the form of the within bond and the sufficiency of the sureties thereon.

[SEAL.] R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

Indorsed: Filed Oct. 18, 1881. Frank W. Gross, clerk, by John O. Wheeler, — clerk.

268 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said supreme court before you, between George W. Frasher, W. T. Somes, Henry McClain, Isaac Dotson, and Joel C. Crush, are plaintiffs in error, and M. J. O'Connor is defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court of the United States to be there and then held, that the record and proceedings aforesaid be[ing] inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of October, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the *one hundred and* 106th.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk.*

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

269 *The Answer of the Justices of the Supreme Court of the State of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] FRANK W. GROSS, *Clerk*,
P. JOHN O. WHEELER, *Deputy.*

[Endorsed:] United States Supreme Court. George W. Frasher *et al.*, plaintiffs in error, *vs.* M. J. O'Connor, defendant in error. Writ of error. Filed Oct. 18th, 1881. Frank W. Gross, cl'k supreme [court] State of Calif'a, p. John O. Wheeler, dep'ty.

270 *Citation and Service.*

UNITED STATES OF AMERICA, *ss:*

To M. J. O'Connor, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the District of Columbia, on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein George W. Frasher, W. T. Somes, Henry McClain, Isaac Dotson, and Joel C. Brush are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of October, A. D. 1881, and of the Independence of the United States the 106th.

[SEAL.] R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

271 [Endorsed:] United States Supreme Court. George W. Frasher *et al.*, plaintiffs in error, *vs.* M. J. O'Connor, defendant in error. Citation. Service of the within citation by true copy thereof admitted, this 18th day of October, 1881. John D. Bicknell, attorney for defendant in error. Filed Oct. 18, '81. F. W. Gross, p. John O. Wheeler, dep.

272 *Clerk's Certificate.*

In the Supreme Court of the State of California.

GEORGE W. FRASHER *et al.*, Plaintiffs in Error,
vs.
M. J. O'CONNOR, Defendant in Error.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the foregoing two hundred and sixty-six (266) pages, numbered from 1 to 266, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the above court, this 25th day of October, A. D. 1881.

[SEAL.] FRANK W. GROSS, *Clerk*,
By C. HARLAN, *Deputy*.

Endorsed on cover: California supreme court. No. 244. George W. Frasher, W. T. Somes, Henry McClain, Isaac Dotson, and Joel C. Brush, plaintiffs in error, *vs.* M. J. O'Connor. Filed 22d July, 1882.

15-102

In the Supreme Court of the United States

OCTOBER TERM, 1884.

GEORGE W. FRASHER *et al.*,
Plaintiffs in Error,
vs.
M. J. O'CONNOR,
Defendant in Error.

No. 244.

In Error to the Supreme Court of the State of California.

BRIEF FOR PLAINTIFFS IN ERROR.

GEO. F. EDMUNDS,
WILLIAM J. JOHNSTON,
Counsel for Plaintiffs in Error.

WASHINGTON, D. C.
C. W. BROWN, PRINTER, 923 F ST., N. W.
1885.

Supreme Court of the United States.

OCTOBER TERM, 1884.

GEORGE W. FRASHER, *et al*,
Plaintiffs in Error,
vs.
M. J. O'CONNOR,
Defendant in Error.
No. 244.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The suit is for the recovery of certain real estate, and the form of action is that prescribed for such purposes by the laws of California, where the property is situated.

The plaintiff in the suit below, and defendant in error here, claimed title by virtue of certain selections of land made by the State in lieu of sections 16 and 36, under the school grant made by act of March 30, 1853, (10 Stat., p. 246, Secs. 6 and 7), a listing of the same to the State by the Secretary of the Interior, and patents thereon issued by said State.

The defendants below, plaintiffs in error here, claiming as pre-emptors under the laws of the United States, by virtue

of settlements made subsequent to said State patents, and other subsequent proceedings, and being in possession under such title, relied upon the same, and contended that the said selections, listing, and patents were absolutely void at law, and gave the plaintiff no title.

The cases were separately tried in the original court without a jury, findings of fact filed, and judgments entered for the defendants. (Tr., pp. 26 to 59.) Motion for new trials upon case stated was filed and overruled, (Tr., pp. 59 to 104), and appeal was taken to the Supreme Court of the State, (Tr., pp. 105, 106), where the judgments and order denying new trials were reversed, with directions to the court below to enter up judgments against the defendants. (Tr., p. 107.) Petition for rehearing in bank was filed and overruled, (Tr., pp. 113 to 116), and defendants thereupon sued out this writ of error, bringing the cause to this court. (Tr., pp. 117, 118, 119.)

The pertinent facts shown by the findings of the original court, and the settled statement of the case upon motion for new trial, are substantially as follows:

The premises in controversy were, at the date of selection by the State, within the claimed limits of an unadjusted private land grant emanating from the former government, known as the Sausal Redondo. This grant was confirmed by the Board of Land Commissioners, and by final decree of the United States district court at its December term, 1856, under the provisions of the act of March 3, 1851, (9 Stat., 631), the locus of the same being fixed by name, by the description of the grant, and by the map accompanying the same, with a limitation of quantity to eleven square leagues. (Tr., pp. 26, 27.)

In February, 1868, at the instance of W. S. Rosecrans, in no way interested in the grant, a survey of the same was made by Deputy Surveyor Hansen. This survey did not include the premises in controversy. The owners of the grant protested against it, on the ground, among other things,

that it did not correspond with the decree of confirmation. Whereupon the Surveyor-General directed another survey, which was made by Deputy Surveyor Thompson in July, 1868. This latter survey embraced all the lands in controversy. Both of these surveys came up regularly on appeal to the Commissioner of the General Land Office and Secretary of the Interior, and remained pending and undecided until 31st day of October, 1871, when the Secretary rejected the Thompson survey of July, 1868, and finding the Hansen survey to be substantially correct, directed the Commissioner to give the necessary orders to carry his views into effect. (Tr., pp. 27, 28–64, 65, 66.)

Thereafter, to wit, March 22, 1875, the Hansen survey, with slight modifications, was approved by the Commissioner, and a patent issued thereon. (Tr., p. 28.)

Upon the execution of the Hansen survey, in February, 1868, the deputy surveyor extended the township and section lines of the public surveys over the lands located outside of the grant claim, and plats of said outside survey were filed in the Register's office at San Francisco April 28, 1868, including the premises in controversy. (Tr., p. 27.) Upon the protest of the grant owners, as above stated, to wit, May 26, 1868, these plats were withdrawn from the Register's office. They were again filed after the Secretary's decision of October 31, 1871, were again withdrawn on the 18th day of March, 1872, and a third time placed in the local office, on the 15th day of June, 1872. (Tr., 27, 28.)

About the 6th day of March, 1868, the said W. S. Rosecrans procured for his own benefit a large number of men to make applications to the State to purchase lands covered by the outside surveys above described, said applications purporting to be made under the provisions of an act of the State Legislature, approved April 27, 1863. None of said applications were signed by anyone; all of the applicants, as part of the same transaction, deeded to Rosecrans; Rosecrans paid all expenses connected therewith, and also paid

such applicants a small sum of money; the applicants were not advised by anyone of the contents of the applications; did not read the affidavits accompanying the same; did not know the contents thereof, and were not sworn to any oath or affidavits connected therewith. These applications and deeds were all one and the same transaction, were wholly fraudulent and void *ab initio*, and contrary to the provisions of said act of April 27, 1863. (Tr., p. 28.)

Certain of the above described applications covered the premises in controversy. They were presented to the State locating agent, four before and one after the filing of said township plats as aforesaid, and were by him accepted and filed. They were not accompanied by affidavits of three disinterested persons, stating that applicants were residents of the State, and that the lands were not adversely occupied, nor did the applicants file in the office of the county recorder a description of the lands, with a certificate of the oath or affirmation endorsed thereon, all of which was required by said act of April 27, 1863. (Tr., p. 28.)

Thereupon the locating agent of the State, in four of the cases at bar, during the period, and in one, after the expiration of the time when such plats were on file in the Register's office, located the said premises in the United States Land Office in pretended satisfaction of the school grant made by the acts of March 3, 1853, (10 Stat., 246), and July 23, 1866, (14 Stat., 218.) (Tr., p. 29.)

Thereafter. to wit, November 23 and 24, 1871, the Commissioner of the General Land Office certified and listed said lands to the State. (Tr., p. 29.)

On the 25th day of August, 1869, the said Rosecrans applied to John W. Bost, Surveyor-General of California, to purchase said lands. On the 27th day of August, 1869, one Robert Gardiner, signing himself as Surveyor-General, but not such at that time, either by election or qualification, accepted said applications. On the 10th day of February, 1872, said Gardiner, then Surveyor-General, approved the

applications, and thereafter, and in consequence of such proceedings, patents of the State issued to Rosecrans. (Tr., pp. 29, 30.)

The title of the defendant in error is deraigned solely through Rosecrans and the proceedings above set forth. (Tr., p. 30.)

In the case of Frasher, the land in lieu of which selection was made was part of section 16, then finally surveyed and located, (Tr., p. 20); in the other four cases, the private grants were not so surveyed or located. (Tr., pp. 37, 44, 50, 57.) The Surveyor-General of the United States has never furnished the State authorities with any list including any of the 16th or 36th sections, in lieu of which these selections were made. (Tr., pp. 29, 36, 42, 49, 56.)

The defendants in error, in April and June, 1876, having previously in good faith settled upon the tracts respectively claimed by each as pre-emptors, applied to file declaratory statement for the same at the United States Land Office. At the time of making such application they were living on the lands with their families, and had valuable improvements thereon. The declaratory statements were deposited in the office, and legal fees tendered. Thereafter, they made the requisite and legal proof of compliance in all respects with law; tendered and deposited the same with the Register and Receiver; tendered the purchase money and all fees, and requested to be allowed to enter the lands, which request was refused by the Register and Receiver. Whereupon the claimants appealed to the Commissioner of the General Land Office, and the said appeals are still pending therein.

The acts of Congress relating to adjustment of private land claims in the State of California are as follows:

Act of March 3, 1851, 9 Stat., 631.
Act of June 14, 1860, 12 Stat.; 33.
Act of July 1, 1864, 13 Stat., 332.
Act of July 23, 1866, 14 Stat., 218, Sec. 8.

The acts conferring the school grant upon the State, and providing for its satisfaction, are as follows:

Act of March 3, 1853, 10 Stat., 244, Secs. 6, 7.
Act of July 23, 1866, 14 Stat., 218, Sec. 6.
Act of August 3, 1854, 10 Stat., 346.

The act of the State Legislature prescribing the method of acquiring title from the State is—

Act of April 27, 1863, Hittell's Laws, Secs. 4188–4190.

The acts of Congress conferring the pre-emption right in California are—

Act of September 4, 1841, 5 Stat., 453, Secs. 10–15.
Act of March 3, 1843, 5 Stat., 619.
Act of March 3, 1853, 10 Stat., 245, Secs. 6, 7.
Act of March 3, 1853, 10 Stat., 244.
Revised Statutes, Secs. 2257–2288.

The judgment of the Supreme Court of the State of California proceeds entirely upon the theory that the defendant's right to controvert the title of the plaintiff rested solely upon naked entries without title or right, and that the approval of the same, and listing to the State by the Land Department, was a final adjudication of the question of title, binding upon the court in a proceeding of this character. (Opinion and Judgment, Tr., pp. 106, 107, 108.)

Assignment of Errors.

1. The court below erred in holding that the listing of the said lands to the State of California by the Commissioner of the General Land Office was not a nullity, but a conclusive adjudication of the question whether the lands were or were not public lands within the meaning of the granting act, binding upon the court in a proceeding of this character.
2. The court erred in holding that the defendant in error

had a patent regular upon its face, following usual proceedings, regular in form.

3. The court erred in not holding the title of the defendant in error absolutely void, for want of power and jurisdiction in the officers of the United States to receive application therefor, under the grant in question, to approve the same or issue lists thereon to the State.

4. The court erred in not holding the listing of said lands absolutely void, under the provisions of the act of Congress approved August 3, 1854.

5. The court erred in not holding the rights of the plaintiffs in error to be vested legal rights under the laws of the United States, paramount to that of defendant in error, and entitling them to judgment.

Brief.

I.

The selections, listing to the State and patents by the State to defendant in error are absolutely null and void, being for land not subject to such appropriation, but reserved.

Grants of land, originating under the former government of California, until settled and adjusted, both as to title and location, were protected, not only under the laws of nations, but by treaty and the laws of the United States.

Treaty of Guadaloupe Hidalgo, 9 Stat., 922, Articles VIII and IX.

Act of Congress, Sept. 9, 1850, 9 Stat., 452, Sec. 3.

Act of Congress, March 3, 1851, 9 Stat., 631, Sec. 13.

The laws of the United States provide a specific method for the settlement of all questions of title and for the identification, segregation and patenting of all confirmed claims.

The title was subjected to the action of the judiciary, with power of location, and the identification, segregation and patenting, under the confirmation, to the land branch of the executive department.

Act of March 3, 1851, 9 Stat., 631.
Act of June 14, 1860, 12 Stat., 33.
Act of July 1, 1864, 13 Stat., 332.
Act of July 23, 1866, 14 Stat., 218, Sec. 8.

As a part of this system, the survey executed by the surveyor general is subject to correction by appeal to the Commissioner, and from that officer to the Secretary, whose decision alone is final, except upon failure to appeal. The act of July 4, 1836, following previous legislation, expressly confers upon the Commissioner, under direction of the Secretary, supervisory powers in the matter of the surveys of private grants, and it is a jurisdiction which has always been exercised without serious question.

Act of April 22, 1812, 2 Stat., 716, Sec. 1.
Act of March 3, 1849, 9 Stat., 395, sections 1 and 3.
Act of July 4, 1836, 4 Stat., 107, Sec. 1.

The act of 1812 gave the Secretary of the Treasury supervising power over the Commissioner; the act of 1836 made all matters relating to the surveys and sales of public lands, and "such as relate to private claims of land," subject to the supervision of the Commissioner, and the act of 1836 transferred the duty of supervision of the Commissioner to the Secretary of the Interior.

Under the latter act the Commissioner, subject to the supervision of the Secretary of the Interior, has jurisdiction over all decisions of his subordinate officers.

Castro *vs.* Hendricks, 23 How., 443.
Maguire *vs.* Tyler, 1 B'k, 201, 202.
Bell *vs.* Herne, 19 How., 262.

A contrary doctrine was at first held in California, but was overthrown in Johnson *vs.* Van Dyck, 20 Cal., 229, on authority of Castro *vs.* Hendricks, *supra.* See also—

Hills *vs.* Sherwood, 33 Cal., 479.
Bissell *vs.* Henshaw, 1 Sawy., 561.
Bernards heirs *vs.* Ashley, 18 How., 43.

And this doctrine has been uniformly held and the jurisdiction exercised by the Interior Department.

Secretary's decision, Rancho El Cahon, Copp. P. L. L., 559.

In this respect the 8th section of the act of July 23, 1866, prescribed no different rule, and even if a survey be made under its provisions solely, it is subject to appeal precisely as if made under the act of 1859 or the act of 1864.

The contention of our opponents in the court below was that the Hansen survey was made under the 8th section of the act of 1866, and that under said act the approval of a survey by the Surveyor General was a finality; that no appeal lay to the Commissioner, and hence that the Sausal Redondo grant was finally surveyed in 1868.

As matter of law, the said survey was not made under that Statute, or if so made was obviously illegal for flagrant violation of the plain provisions of the act. It was not an extension of the public surveys over the tracts and a setting off of the quantity confirmed, but a simple survey of the supposed grant exactly as in cases under the acts of 1851 or 1864, and a survey of the excluded and adjoining land into government townships. There was no pretense of following the act of 1866 and a literal compliance with the prior acts. So, too, the instructions of the Commissioner to Surveyor General under the act of 1866 (Copp P. L. L., p. 452) required that notice should be given to the claimants of the contemplated survey, which was not done. It follows, therefore, that if the Hansen survey was clothed with any va-

lidity, it was by virtue of its being a survey under the act of 1864, and not that of 1866.

Treated, however, as a survey under the act of 1866 it is entirely clear that appeal lay to the Commissioner and Secretary, as in other cases.

(*a.*) The act of 1866 and that of 1836, giving the Commissioner supervisory powers are, *in pari materia*, part of the same general system, and no repeal of the latter by the former, even *protanto*, can be presumed to have been intended, or be constructively allowed. It is not to be presumed for a moment that Congress intended to depart from the general system which had then prevailed for many years, except upon clear manifestation of such intent. There is no such intent manifest in the language, or seen in the surrounding circumstances. No repeal will be presumed.

(*b.*) The act of 1851 is apparently mandatory in requiring the issuance of a patent by the Commissioner upon the presentation of a survey approved by the Surveyor General. (See Sec. 13). The language is certainly positive and apparently unambiguous. Yet this court in the cases cited above, preserved the uniformity of the land system by maintaining the supervisory power of the Commissioner and Secretary, conferred by the former act of 1836. That is the precise question here, except that the language of the act of 1866 does not approach that of 1851 in its peremptory and mandatory character.

(*c.*) The department itself seems to have entertained no doubt upon the subject, but to have adopted a construction giving appellate power, and exercised it.

Circular of Instructions, Copp L. L., 591.
Rancho Las Pietos, *Id.*, 452.

(*d.*) The doctrine of relation cannot be invoked, based upon a subsequent approval in substance of the Hansen survey, for that doctrine is never applied except to protect a meritorious right against an intervening claim. Nor if ap-

plied would it affect the legal status of the lands as reserved at the date of selection.

It follows in the case at bar that the location of the Sausal Redondo grant was *sub judice* at the date of the location of these lands by the State. The applications to the State agent and his location of the lands in the United States Land Office were in 1868. The contest over the Hansen survey of the grant was not decided by the Secretary until October 31, 1871, and the modified survey therein ordered was not approved until March 22, 1875.

Lands thus included in the claimed limits of a Mexican grant, *sub judice*, are reserved, and are not subject to location by the State as indemnity for sections 16 and 36 lost.

Huff *vs.* Doyle, 50 Cal., 16.
Newhall *vs.* Sanger, 92 U. S., 761.

Any attempt on the part of the State to select such lands, or of the officials of the United States to dispose of the same, is absolutely void for want of authority or jurisdiction. The lands are not of a class subject to sale, and as the officials of the United States can only dispose of lands when thereunto duly authorized by law, it follows that the attempt to sell is a mere nullity. It is a question of jurisdiction, not of mistake in the exercise of legal power. The lands in question were selected, and the selections allowed, while reserved from appropriation; this the officers of the United States had no authority to do, and this want of power can be shown in an action of ejectment.

Morton *vs.* Nebraska, 21 Wall., 660.
Easton *vs.* Salisbury, 21 How., 426.
Sherman *vs.* Buick, 93 U. S., 209.
Best *vs.* Polk, 18 Wall., 112.
Polk's Lessee *vs.* Wendell, 9 Cranch, 99.
Polk's Lessee *vs.* Wendell, 5 Wheat., 303.
Patterson *vs.* Winn, 5th Wheat., 388.
Rice *vs.* Railroad, 1 Black., 360.
Foley *vs.* Harrison, 15 How., 433.

If an officer sells land not subject to sale, the disposition is absolutely void for want of jurisdiction, and is no bar to a pre-emption settlement. To this effect are all of the following additional cases, commencing with the opinion of that eminent jurist, Attorney General Wirt, in 1828, and ending with a decision of the Supreme Court as late as 1883:

Att'y Gen'l Wirt, 2 opin., 86.
Att'y Gen'l Butler, 3 Id., 354.
Wilcox *vs.* Jackson, 13 Pet., 498.
Stoddart *vs.* Chambers, 2 How., 284–317.
Bissell *vs* Penrose, 8 Id., 317, 333, 334.
Mills *vs.* Stoddart, Id., 345.
Mintur *vs.* Crommelin, 18 Id., 88.
Reichart *vs.* Phelps, 6 Wall., 160.
Belk *vs.* Meagher, 104 U. S., 279, 284.
Smelting Co. *vs.* Kemp, Id., 636, 641; 644, 646.
Steel *vs.* Smelting Co., 106 U. S., 447, 452, 453.

And to the same effect, as applied to invalid State selections are the following departmental cases:

State *vs.* Floyd, Copp., (1 Ed.) 326.
State *vs.* Haile, Id., 324.
Arrochochea *vs.* State, Id., 325.
Taylor *vs.* State, Id., 330.
McLean *vs.* Stanley, Sec'y's Decision, Feb. 5, 1875.
Selby *vs.* State, 1 Copp., (2 Ed.) 634.

Attorney General Wirt in the opinion above cited, thus tersely stated the law:

"Lands excepted from sale by acts of Congress ought not to be sold, and if they have been inadvertently sold, the sale is void for want of authority. * * * They have not been sold because there was no power to sell them; the sale was void in its inception. * * * Those sales are now, in legal contemplation, mere nullities. And with the discovery and full knowledge of this fact before us, why should we persist in the error, and affect to clothe with the sol-

emnity of a patent, an act which we know to be utterly null and void."

And the Supreme Court in 104 U. S. (supra) thus conclude a chain of authorities, covering sixty-seven years of adjudication:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department *had jurisdiction to act and execute it*, that is to say, in a case where the lands belonged to the United States, and *provisions had been made by law for its sale*. If they never were public property, or had previously been disposed of, or *if Congress had made no provisions for their sale*, or *had reserved them*, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be *inoperative and void*, no matter with what seeming regularity the forms of law may have been observed." (p. 641.)

Counsel for defendant in error in his brief already filed in this court, asserts the doctrine that a patent of the United States cannot be attacked in a collateral proceeding by parties not connected with the paramount title, and cites Doll *vs.* Meador, 16 Cal., and the Smelting Company cases in 104 and 106 U. S. Of that general doctrine there can be no question. But Doll *vs.* Meador, expressly declares that such a patent may be collaterally impeached when void on its face, when issued in advance of legislation authorizing disposition of the land, when issued by an officer not authorized to sign the same or where issued for an estate prohibited. And in the Smelting Company cases as we have already shown, this court expressly declares that the conclusive presumptions attending the patent are limited to cases where the executive had jurisdiction to convey and the land was not reserved.

It follows that the applications and selections in the cases at bar were absolutely void *ab initio* and that this can be shown in an action of this character.

II.

The applications and selections are also void because made in lieu of lands not lost to the State.

In four of the cases at bar, the lands in lieu of which the selections were made were within the limits of Mexican grants, unsurveyed and unadjusted. Until final survey and adjustment, it is impossible to tell whether or not the land will not inure to the State in place, and until such adjustment the State has lost no land and is entitled to no indemnity. The right of the State depends upon the condition of lands for which indemnity is taken as well as the condition of that claimed.

Huff *vs.* Doyle, 93 U. S. 558.

The act of July 23d, 1866, Sec. 6, expressly provides that the loss, if any, shall be ascertained "when the final survey of such grants shall have been made," and that after such sruvey, the United States Surveyor should furnish lists as a basis for such selections.

In the cases at bar, no lists were furnished and the grants, in fact, had not been surveyed.

III.

The applications, selections and subsequent proceedings were also void, because not in conformity to the State act.

The 4th section of the act of the Legislature of April 27, 1863, under which these applications were made, provides in respect to applications for unsurveyed lands, that the applicant shall file an application and affidavit with the State authorities, "that he is a citizen of the Uuited States, or "has filed his intention to become a citizen; that he is of "lawful age, and is a resident of the State; that the lands "sought to be purchased are unoccupied except by the appli-

"cant; and that there are no improvements on said lands "other than his own; and that to the best of his knowledge "and belief, there is no valid claim existing to said land, "adverse to his own; and if the applicant be a female, that "she is entitled to purchase and hold real estate in her own "name under the laws of this state; all of which shall be "verified by the affidavit of three disinterested witnesses."

Section 6 of the same act prescribes the same requirements when the land is surveyed. (Hittell's Digest, Sec. 4188–4190.

This act was not complied with in the following material requirements.

(*a*) The applications were not signed by any one.

(*b*) The whole proceedings were fraudulent, both as to the applicants, the State and the United States.

Findings of the court, Transcript, pp, 28, 35, 41, 48, 54, 55.

Sec. 28, act of April 27, 1863–Hittell, Sec. 4212.

(*c.*) The applications were not accompained by the affidavits of three disinterested persons as to the residence of the applicant and non-occupancy of the land.

(*d.*) No certificate was filed with the County Recorder, as required by Section 29 of the act.

(*e.*) The locating officers of the State were not authorized to locate any lands not applied for in the manner pointed out in the act.

IV.

The listing of the lands to the State, based upon selections void ab initio, was also void, and is not conclusive upon the courts.

What has already been said as to the character of the acts of the local land officers, applied with equal force to the acts of the Commissioner and Secretary in listing the lands to the State. It was likewise void and of no effect under the doctrine of the cases cited. It was an attempted convey-

ance of lands not subject to such disposition, an act outside of jurisdiction, without power and was therefore void.

In his brief already filed in this court, counsel for defendant in error contends that this listing is a conclusive adjudication of the question of the right State to select, and the Department to list these lands, citing again the Smelting Company case. But counsel forgets the underlying principles of all the decisions recognizing the conclusive character of departmental adjudication, viz:—that the Department has proceeded with jurisdiction; has sold land that it was authorized to sell and further that the adjudication was one of *fact*, and not of law. No construction of law is conclusive, nor of course any act outside of jurisdiction. The distinction is recognized in the Smelting Company case as already shown, and is not a new question in this court.

V.

Even if this were otherwise, the statute itself prescribed the legal effect of this list and as to these lands declares it "perfectly null and void."

The act of August 3, 1854, in specific language declares the legal effect of this listing. "If the lands covered by it "are of the character contemplated by such act of Congress "and intended to be granted thereby," fee simple title is conveyed thereby; if not of that character, the list "*shall* "*be perfectly null and void, and no right, title, claim or interest* "*shall be conveyed thereby.*"

This language is absolutely unambiguous and needs no construction. If the list covers land properly included in the grant, it is a valid conveyance; if it covers land not properly included in the grant, it is void. This provision necessarily precludes the idea of any *finality* by listing. The right to inquire upon that point is expressly reserved to the proper courts, in all proper proceedings, and the solution of the question determines whether any title is conveyed. The

court here, in this proceeding, is to determine whether the lands included in this list were "of the character contem-"plated by such act of Congress and intended to be granted "thereby." If not, then this list, as to such lands, by the express terms of the statute, is "perfectly null and void."

VI.

The defendants are in such privity with the United States as to entitle them to impeach the listing.

It follows that at date of the pre-emption settlements, filings, proof and tender the tracts in question were lands "belonging to the United States," and according to the express language of the Revised Statutes and preceding legislation, subject to pre-emption appropriation. Each of the claimants had fully and at all times complied with all the provisions of law, and is only deprived of a legal certificate of entry by the erroneous acts of the executive officers. They claim directly under and through the United States. Not only are they in privity with the paramount source of title but have also the best and only legal right.

Page *vs.* Hobbs, 27 Cal., 483.
Kile *vs.* Tubbs, 23 Cal., 442.
Kile *vs.* Tubbs, 28 Cal., 402.

It is not necessary that the defendants have a perfect legal title from the United States, to enable them to contest these pretended titles.

Robinson *vs.* Forrest, 29 Cal., 320.
Lytle *vs.* Arkansas, 9 How., 333.
Bernards Heirs *vs.* Ashley, 18 *Id.*, 43.

VII.

The act of Congress approved, March 1, 1877, *is not a con-*

firmation of these selections, and has no application whatever to them.

This act is commonly known as the "Booth Bill." Defendant in error seems to think that the selections under which he claims have been vitalized from a state of nullity into a state of validity by this act. But such is not the case for the following reasons:

(*a.*) The record here discloses deliberate, premeditated fraud, in fact and in law, upon the part of defendant in error and his grantor in the making of the selections in hand; and this act was not passed or intended to ratify or approve *fraudulent* selections, even in the cases to which the act applies.

(*b.*) The selections in controversy were void *ab initio*, because made of lands held and claimed as a part of a Mexican grant; and so there was nothing to be *confirmed* by the act. The act is but confirmatory of certain designated selections. It is not a *new grant.*

A confirmation may make a defeasible estate good, but cannot work upon an estate that is void in law.

Coke *vs.* Litt, 295.

A confirmation by Letters Patent which are void as against law, is a void confirmation.

1 Litt. Ab., 295.
Dyer, 109.

(*c.*) The curative or confirmatory scope of the act applies only to defects existing in the condition of the *basis* lands (*i. e.*, 16th and 36th sections), and does not at all apply to defects existing in the condition of the *lieu* lands; and selections of lands lying within a Mexican grant are not cured or confirmed by the act.

Sec. 1 applies to lands which had been then selected and certified to the State in lieu of 16th and 36th sections included within final surveys of Mexican grants, and which

selections were irregular, because the final surveys of such Mexican grants had not been made at the date of the selections of the lieu lands. Sec. 2 applies to lands which had then been selected and certified to the State in lieu of 16th and 36th sections lying within the exterior boundaries of Mexican grants *sub judice*, but excluded from the final survey of such grant, and not in fact ultimately lost to the State. Then follows a provision that such 16th and 36th sections shall be disposed of as other public lands; and a proviso applicable to purchasers of lieu lands in cases where there was no basis for the lieu selection, and by which they were enabled to purchase the lieu lands from the United States at minimum price. Sec. 3 makes provision for the protection of homestead and pre-emption settlers upon the lieu selections contemplated by the act. Sec. 4 excludes certain lands from the operation of the act on account of their quality and location.

But as we understand it, defendant in error does not claim any benefit or confirmation from these specific provisions of the act. His entire reliance is placed on the words "or are otherwise defective or invalid." To give these words the effect claimed for them by defendant in error, or to give them such an effect as to confirm the selections in hand, would not only constitute them into the effect of a new grant of lands, but would also give these six words an infinitely broader effect than the remainder of the entire act. In short, if these six words are to have the general and sweeping effect which is to include the confirmation of the selections under which the defendant in error claims, it was idle to have any other words included in the act. Although the entire text of the act, excepting these six words, applies to defects in the condition of the basis lands, (16th and 36th sections), it is claimed that these six words include not only defects of every kind in the condition of the basis lands, including those specially named and provided for in the act, but also defects of every kind in the condition of the lien

lands, and even defects which rendered the selections *absolutely void*, as in the case at bar.

We submit that these six words should be supplemented and read thus: "Or are otherwise defective or invalid by reason of the condition or nonexistence of the basis lands," (*i. e.*, the 16th and 36th sections.) This will be in consonance with the entire provisions, and with the provisos of the act, and be in accordance with the evident intention of Congress.

Bailey *vs.* U. S., 109 U. S. Rep., 432.
Smith's Commentaries, §503.
Sedgwick on Statutory Const., 2d Ed., p. 260.

(*d.*) Prior to this act the plaintiffs in error had vested rights which could not be divested by any statute of Congress. Although a pre-emption right prior to proof of compliance with law and payment for the land is subject to the action of Congress, yet it is not so subject after such compliance and payment.

Yosemite Case, 15 Wall., 77.
Myers *vs.* Croft, 13 Wall., 291.

And the offer of such proof and tender of payment, (improperly rejected by the local officers), puts the pre-emption claimant, upon abundant authority, in exactly the same legal position as if his entry had been allowed.

VIII.

The equitable defense set out in the answers is conclusive of the case.

Under the laws of California the code of civil proceedure, the answer of the defendants and findings of the court, the cases may be treated as cases of equity consideration exactly the same as if presented upon bill and answer or bill

and cross-bill. Whatever defense could be relied upon by answer or cross-bill can here be relied upon under the pleadings.

In California there is but one form of action for the enforcement of private rights, the party complaining being known as plaintiff and the adverse party the defendant.

Code of Civil Proceedure, 307–308.

The pleadings are the formal allegations by the parties of their claims or defenses, and consist solely of the complaint and answer or demurrer to either.

Id., 420–422.

The answer may set up a statement of any new matter constituting a defense or counter claim.

Id., 437.

On that defense or counter claim may be any equitable consideration sufficient to sustain a bill or cross-bill.

Lestrade *vs.* Barth, 19 Cal., 661–671.
Bruck *vs.* Tucker, 42 Id., 346–352.
Talbert *vs.* Singleton, 42 Id., 390.
Guedice *vs.* Boots, 42 Id., 452, 456, 457.
Miller *vs.* Fuller, 47 Id., 146.
Thompson *vs.* Thompson, 52 Id., 154.

The Rosecrans title, under which defendant in error claims, if not absolutely void by reason of the fraud, accident, and mistake, found by the court to have been committed in listing the lands to the State, is clearly voidable for those reasons, and this may, under the above authorities, be made available on the pleadings in the case at bar.

By consolidation in this court, cases No. 312 and 313 are to be submitted with that of Frasher et al. *vs.* O'Connor, No. 244. The former two cases were tried after the decision of the Supreme Court of the State in Frasher *vs.* O'Connor,

and upon its authority, judgment in both courts was in favor of defendant in error here. The opinion of the Supreme Court in each of the former cases recites that the facts are identical with those in the case of O'Connor *vs.* Frasher et al., (Trans. 312, page 38 ; No. 313, p. 21 ;) and this is conceded by counsel at page 39 of his brief.

The preceding brief in No. 244 may therefore be considered as a submission of Nos. 312 and 313.

GEO. F. EDMUNDS,
WILLIAM J. JOHNSTON,
Counsel for Pl'ffs in Error.

15-10 E

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1884.

GEORGE W. FRASHER ET AL.,
Plaintiffs in Error,
vs.
M. J. O'CONNOR.

No. 244.

Brief for Defendant in Error.

EDWARD R. TAYLOR,
Counsel for Defendant in Error.

SAN FRANCISCO, CAL.
W. A. WOODWARD & CO., PRINTERS.
1884.

15-102

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October Term, A. D. 1884.

GEORGE W. FRASHER ET AL.,
Plaintiffs in Error,
vs.
M. J. O'CONNOR.

No. 224.

In Error to the Supreme Court of the State of California.

Brief for Defendant in Error.

I.

The plaintiffs in error (defendants below), claim as pre-emptors, alleging settlement in 1876, *four years after the United States had listed the land to the State, and two years after the State of California had issued her patent to the defendant in error—plaintiff below.* At the time of the entry upon the land of

plaintiffs in error, it was in possession of the lessees of defendant in error, who were using it for the purpose of pasturing sheep.

The claim is, that the land (being lieu land), at the time it was selected by the State and at the time it was listed to her, was within the claimed limits of the Rancho Sausal Redondo, it being asserted that the survey excluding the lands in controversy did not become final until after the selection and listment; and further, as to some of the plaintiffs in error, that the sixteenth or thirty-sixth section in lieu of which the selections were respectively made, had not, by final survey, been ascertained to be lost to the State at the time of the selection and listment.

The local land office and the general land office of the United States have refused to recognize the claims of the plaintiffs in error; and by virtue of the rulings of the land department in this class of cases which we shall call particular attention to in the course of the argument, it will be impossible for them to ever obtain any recognition there.

We have, then, on behalf of the defendant in error, a grant from the United States to the State of California, and a grant from the latter to his grantor; while, as opposed to this, we have, as stated in the opinion of Sharpstein, J., speaking for the Court to which this writ has run, "A naked entry by the defendant upon the land,

more than two years after the State had sold and patented it to the plaintiff's grantor, and more than four years after the land had been listed by the United States to the State" (Transcript of Record, p. 107). The grants of two sovereigns, valid on their face, are sought to be collaterally impeached by parties who have not, and can not, connect themselves with either. It is wholly unnecessary for us to cite to this Court the numerous cases which hold that no such collateral impeachment is permissible. The doctrine on this subject was laid down in California by MR. JUSTICE FIELD, in *Doll vs. Meador*, 16 Cal., 325, and to it our Supreme Court have firmly adhered; while the Supreme Court of the United States have, in the very recent cases of *Smelting Co. vs. Kemp*, 104 U. S., and *Steel vs. Smelting Co.*, 106 U. S., emphatically re-affirmed what they have consistently held from the beginning.

In those cases where a collateral attack upon the patent has been permitted, the assailant has connected himself with the paramount source of title, either by a grant or by an overruling equity. And, in the latter case, the equity must be so strong as to control the legal title; otherwise it is of no avail. The plaintiffs in error claim under no paper title of any kind. Have they an equity which can control the legal title asserted against them? So far from this, they have no equity at

all, as is perfectly manifest; and so it was held by the Secretary of the Interior, in August, 1876, in the case of Selby, which involved not only State selections made on the Sausal Redondo, but the rights, as well, of pre-emptors, who stood in precisely the position of plaintiffs in error. For these reasons, we beg to give the decision in full :

"DEPARTMENT OF THE INTERIOR,

WASHINGTON, *Augnst* 18, 1876.

SIR: The case of *Geo. C. Selby et al., pre-emptors vs. State of California*, was decided by me under date of March 10, 1876, in favor of the pre-emptors.

It having been shown that this decision affected the title of the State to a very large and valuable body of lands, and that the State authorities, being unaware of the pendency of the case, had failed to present any argument in support of its title, a rehearing was ordered by me and very full and exhaustive arguments have been presented in behalf of both parties. Never doubting that all selections of lands made by the State of California, in lieu of the 16th and 36th sections, embraced within the limits of a private grant, before the approval of the survey of such grant, were irregular and not in conformity with law; and being informed that the subject of confirming such selections was pending in Congress, I have withheld my decision in the case for the action of that body.

Congress having adjourned without legislating on the subject, it becomes my duty to dispose of the case. It cannot be doubted, and I do not understand it to be questioned by the attorneys for the State, that the right of the State to make their selections only attaches when the final survey of the grant is made. Whether a survey is final or not can only be known when it receives the approval of the Commissioner of the General Land Office; consequently

the right to select can only be exercised by the State upon such approval.

Tested by this rule, the selections made by the State of the lands in question were *premature and irregular*; and if the lists containing the same were now presented to me for approval, I should be compelled to reject the same. But I learn that the State, in many instances, has proceeded to make selections without obtaining lists from the Surveyor-General; and these selections have subsequently been certified by your office and approved by this department; and on the face of such approval, thousands of acres have been sold to *bona fide* purchasers. On many of these lands improvements have been made by such purchasers, and their value thereby become greatly enhanced. From the date of the approval of these selections, the lands have been treated by your office as the property of the State, and not subject to entry under the homestead and preemption laws of the United States.

Under the circumstances, no settler who has gone upon the selected lands subsequent to the approval of the selection, can complain that he did not have full notice of the claim of the State, and of the action of this department.

If any person, entering adversely to the State, has made any improvements on the land, it has been done with full knowledge that, under the rulings and practice of your office, no entry by him would be permitted.

It is contended by counsel for the State that the approval of the selections by this Department relates back to the date of selection and is not subject to revision but is conclusive upon me. I am not prepared to yield full assent to this doctrine. The selection was not made by any officer of the United States and could not bind the government.

It was made without authority of law, and possessed no validity until it received the approval of the Secretary. From the date of its approval it operated as a reservation of the lands from private entry, but the approval under such circumstances should not be held to relate back to the

date of selection, to the injury of adverse claims to the land In this case it appears that the township plats were filed in the Land Office at San Francisco, April 22d, 1868, and the greater part of the lands were selected by the State on the same day; one tract was selected May 12, 1868, and on the 27th May, 1868, the plats were withdrawn by the Surveyor-General. The plats being withdrawn from the records it also appears that the selections were not entered up by the Register. The plats remained withdrawn until Nov. 21, 1871, when they were filed in the Los Angeles district within which the lands in question were then situated. In the meantime the parties claiming under the pre-emption laws allege that they settled upon the land in good faith without notice of any claim by the State. The selections were approved by Secretary Delano on the 24th November, 1871, with the exception of S. E. ¼ 29., T. S. 13 W., which was approved Oct. 26, 1872.

Selby, Wilkinson, McClain, Green, Foster, McCreary, Ketchum, Douglas and Hand *were each allowed to file D. S. for the lands occupied by them*, their filings were promptly offered in some instances before the approval of the selections and in every instance within fifteen days after the filing of the plats, and each alleges settlement long prior to Nov. 21, 1871, though subsequent to April 22, 1868.

I cannot learn that their filings were cancelled by your office, or that any objection was made thereto until they offered to prove up and pay for the lands, when the entrees were held by you for cancellation, and the case is now here on appeal from that order.

James Pierce applied to file, February 24, 1873, alleging settlement July 25th, 1870, and Jos. McEvoy applied to file, March 29, 1873, alleging settlement October 21, 1871.

In view of the facts above stated, I am of the opinion that my decision of March 10, 1876, should be vacated, and the selection approved by this department to the State before final survey of said grants should be permitted to stand, subject to the following qualifications:

1st. All subsisting homestead or pre-emption rights which *antedate the approval of the selections* should be allowed priority over the claims of the State.

2d. Whenever, upon the approval by your office of the survey of a private grant, it shall be found that any section or part of a section for which lieu land have been selected falls without the survey, the selections so made shall be deemed invalid, unless the State shall substitute therefor another 16th or 36th section, for which it shall then be entitled to make selections.

No further selections should be permitted in advance of the approval of the survey; and the Surveyor-General of California should be instructed not to furnish lists to the State of the 16th and 36th sections included within the limits of any private grant, until he shall have received official information from you that the survey thereof has been approved. Selections by the State should only be permitted upon the lists received from the Surveyor-General.

Applying the rules above indicated. I direct that Selby, Wilkinson, McClain, Green, Foster, McCreery, Ketchem, Douglass and Hand be allowed to make their final proof; and, upon showing full compliance with the law, they be permitted to make payment and receive patents for their lands.

The applications of Pierce and McEvoy came too late, and should be rejected. I return herewith the papers transmitted with your decision.

Respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office."

This decision is important as showing that the plaintiffs in error can never hope for recognition at the hands of the Land Department; and further, that there is no equity in their claim which can be successfully asserted against the

legal title, upon the ground, if no other, that the asserted pre-emptors entered upon the possessions of those who claimed under a listment made years before their entry. It was upon the lines laid down in this decision that the Booth Bill was framed, as will hereafter appear when we come to treat of it.

Quinn vs. Chapman, 111 U. S., 445, is very much in point here. In that case Quinn set up an equity with which he sought to control the legal title, and claimed, as is claimed here, that his adversary's title was void as resting upon a settlement made upon land claimed as part of a Mexican grant, while he went upon the land as pre-emptor after the final survey had excluded the premises in controversy. The Court, speaking through MR. JUSTICE MILLER, disposed of Quinn's equity in language which is so pertinent to the cause at bar, that we think it well to quote at length:

"The claimants under the patent are prior to him in every point. Hollingsworth settled on the land, built a house on it, lived on it, and was buried on it, while Quinn was yet a foreigner, and incapable of making a valid claim. It is true that the land not being then open to pre-emption, Hollingsworth gained no legal right to it, but he had a right to believe that if, when the De Haro claim was surveyed, it was found the land on which he lived was open to pre-emption, he would have the prior right if he came in time. He died in that belief, and the lawful representative of his minor children, at the earliest moment after the

land became subject to pre-emption, asserted their right, paid the price of land, and after an expensive contest with others, received the title from the United States. We do not think their equity in the matter can be disputed.

"What is Mr. Quinn's equity? He has never paid a dollar for the land, has received no title nor any recognition of his claim from the government or anyone else.

"Perceiving that no one was in the actual occupancy of the land, but knowing that the claim of the heirs had been recognized at the land office months before, he hastily prepared himself by declaration of intention to become a citizen, went boldly upon land on which Hollingsworth lived and died, and because there was no one there to defend the possession, built his cabin and asserted a right superior to the heirs of Hollingsworth. In this, also, he was a year later than Chapman, representing the heirs of Hollingsworth. His claim has been denied by the land office from the beginning; he has paid nothing, received no recognition, acquired no vested rights."

Where the pre-emptor is in possession, asserting his pre-emption right at the time proceedings are initiated against him by the subsequent patentee, he has been permitted to assail collaterally the title of such patentee; and such was the case of *Lytle vs. State of Arkansas*, 9 How., 333, which has done duty on so many occasions. But in the case at bar, these conditions are reversed; for here, the *patentee* was in possession asserting his right under the patent, when the pre-emptor initiated his proceedings against him. To use the language of MR. JUSTICE MCLEAN, the pre-emption claim was not "covered by law," in fact, had no existence when the patentee entered upon the

legal title, upon the ground, if no other, that the asserted pre-emptors entered upon the possessions of those who claimed under a listment made years before their entry. It was upon the lines laid down in this decision that the Booth Bill was framed, as will hereafter appear when we come to treat of it.

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land under his patent. The limitations of the Lytle case are well illustrated in *The Yosemite Valley case*, 15 Wall., pp. 88–93; in *People vs. Shearer*, 30 Cal., pp. 653–654, and in *Hutton vs. Frisbie*, 37 Cal., pp. 495–497.

And in *Rosecrans vs. Douglas*, 52 Cal., 213 (if it be an authority in view of what has since been decided), the record shows that defendant bought from one in possession in the year 1869; that he thereupon lived upon the land, doing everything necessary for a pre-emptor to do; and that he applied to purchase the land some days before the listment; that his settlement was two years before the listment and five years before the patent.

II.

But assuming that plaintiffs in error are in a position to collaterally attack the State patent, still they must fail, for the reasons following:

First. The listment is conclusive as against them. The listment being the sole instrument by which the title to lieu lands is translated from the United States to the State, it is in all essentials a patent—and hence is within the rule as to collateral impeachment. The statute providing for such listing is that of August 3, 1884, and reads as follows :

"That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to anyone of the several States and Territories; and where said law does not convey the fee-simple title of such lands, or require patents to be issued therefor; the lists of such lands which have been or may hereafter be certified by the Comissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee-simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

The land here in controversy is what is known as "lieu land," and falls within section seven of the Act of March 3, 1853, which provides "that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or where such sections shall or may be reserved for public uses, *or taken by private claims*, other land shall be selected by the proper authorities of the State, in lieu thereof, agreeably to the provisions of the Act of Congress approved on the 20th of May, 1826, entitled: 'An Act to appropriate lands for the support of schools in certain townships and fractional townships, not be-

fore provided for,' and which shall be *subject to approval by the Secretary of the Interior.*"

It is hence the duty of the Secretary of the Interior to determine, in all cases of attempted State selections of lieu lands, whether or not the selections are those contemplated by the law, and if they are such, then to approve them; whereupon the Commissioner of the General Land Office is to list them to the State under the seal of his office. The language of MR. JUSTICE FIELD, speaking for the Court, in *Steel v. Smelting Co.*, 106 U. S., 450, is hence appropriate here:

"That Department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this Court by repeated decisions."

And the learned judge of the United States Circuit Court, sitting for the Ninth Circuit,

well says, in *Dodge vs. Perez*, 2 Sawyer, at page 654:

"The Surveyor-General determined that these lands were subject to be surveyed as public lands, and accordingly surveyed them. The lands having been officially surveyed by the proper officers, the State of California selected them as a part of the lands granted to the State by Congress, and filed the selection in the proper land office; and thereupon the proper officer, after taking ample time for consideration, determined that they were subject to selection, and listed them over to the State. To determine these questions, and act upon the determination was a part of the duties of the land officers, and if they made a mistake in judgment, their action was erroneous, and not a mere nullity. If nobody else complains, the government cannot, and the title of the United States certainly passed."

Secondly. The township plat was on file when the State selection was made, and this plat was in accordance with a survey of the Sausal Redondo, subsequently approved by the Secretary of the Interior. This being so, the State selection was good; and so the Secretary of the Interior held in the following decision, which we quote in full, not only because of the ruling there made, but also for the statement of the facts in regard to the survey of the Sausal Redondo:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Aug. 7, 1877.

SIR:—In the decision of my predecessor dated August 18, 1876, the pre-emption claim of David Foster to the N. W. ¼ of Section 24, Township 2 South, Range 14 West, Los Angeles, California, was recognized among others upon certain conditions.

On the 11th of October following you were notified that the State selection made April 22d, 1868, of the tract claimed by Foster was valid, as the same was for land lost within the Rancho El Sobrante de San Jacinto, approved and patented October 26, 1867, and the pre-emption claim was rejected. On the 24th of the same month the letter of the 11th was withdrawn, and you were instructed to recognize said pre-emption claim. The reason assigned for this action was that the tract in question was within the exterior limits of the Rancho Sausal Redondo, the final survey of which was approved in 1875, and the State selection in 1868, being for land reserved at the date thereof, was illegal.

On the 11th of December, following, Messrs. Britton & Gray, attorneys for the State, made application for the reinstatement of the decision of October 11. This is now before me for consideration.

This application is based upon the ground that at the date of the selection the land was not reserved on account of said grant, but was properly subject to such selection and certification.

To arrive at an understanding in the case, the action of the Department in the matter of the survey of the Rancho Sausal Redondo must be reviewed. In the decision of your office dated June 22, 1870, the facts in regard to the various surveys are set forth at length.

It appears that in 1858 the first survey was made by Henry Hancock, which was objected to by the owners and not approved by the Surveyor-General; but it does not appear that it was ever officially disapproved or the claimant was ever notified of any official action thereon. It was supposed, however, to have become obsolete from the length of time which had elapsed since its execution without its being approved.

As no application was made for a survey by the owner, under the Act of June 14, 1860, or the Act of July 1, 1864, the Surveyor-General instructed Deputy Surveyor Hanson to make a survey under the provisions of the 8th section

of the Act of July 23, 1866. This was done in February, 1868.

The owners of the grant, however, protested against the segregation thus made, and as it appeared that the Surveyor-General had failed to comply with the instructions of your office in relation to such surveys, the plats prepared by Hanson, which had been approved and filed in the local office, and upon which the State selection was made, were withdrawn in May, 1868, and a new survey ordered under the Act of 1864, which was executed by Deputy George H. Thompson, in July, 1868.

In passing upon these surveys, June 22, 1870, your office held that the survey made by Hancock, in 1858, "was vitually disapproved by the Surveyor General, when he issued instructions for the re-survey to George H. Thompson, that the segregation in supposed conformity to to the Act of 1866 was contrary to law and instructions, and that the survey executed by George H. Thompson, in July, 1868, should be set aside as incorrect in the particulars of the eastern and northern boundaries," and a new survey was ordered.

An appeal was taken from said decision, and the case was examined by Assistant Attorney-General Smith, whose opinion thereon, dated October 23d, 1871, was adopted by Secretary Delano, October 31st, 1871.

The opinion of the Assistant Attorney-General concluded as follows: "I think the Hanson survey does substantial justice between these parties, and I recommend that it be approved, and that the township plats made by him be restored." The Secretary concurred in these views and instructed your office to carry them into effect.

In the opinion above cited Mr. Smith holds that by the decree of the Court, but five leagues were confirmed; this was substantially embraced in the Hanson survey, while the Thompson survey included a much larger tract; hence the approval of the former and the rejection of the latter survey.

The eighth section of the Act of July 23, 1866, provides, "That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this Act, as provided by Sections 6 and 7 of the Act of July first, eighteen hundred and sixty-four, 'to expedite the settlement of titles to lands in the State of California,' and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested, as provided by said sections, within ten months after the passage of this Act, or any final confirmation hereafter made, it shall be the duty of the Surveyor-General of the United States for California, as soon as practicable after the expiration of ten months from the passage of this Act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off, shall be subject to the general land laws of the United States; *Provided*, That nothing in this Act shall be construed so as in any manner to interfere with the right of *bona fide* pre-emption claimants.

If the question relative to the Hanson survey was an original one for consideration, I think doubt might be entertained as to the legality of said survey, so far as it relates to the tract included within the limits of the private claim, for, as a matter of fact, it appears that instead of extending the lines of the public surveys over the tract, and setting off the quantity specified, as directed by the Act, a survey of the tract containing the amount of land specified was made as in other private claims, under former Acts. No lines of the public surveys were extended over the same, and it was not set off according to said lines. The township plats appear to have been constructed to

conform to said survey. This action was not in accordance with the express and plain provisions of the statute. That question will not, however, be considered, as said survey was recognized and approved by this department six years ago as valid, and the question of its validity is *res judicata*.

The question for consideration, at the present time, is, not the survey of the private claim, but the status of the public lands at the date of the State selection.

It will be observed that no provision is made in the statute for the approval of the survey under the Act of 1866, by the Commissioner of the General Land Office, as in the Act of July 1st, 1864, relating to the settlement of private land claims. On the contrary, the Surveyor-General is directed to extend the lines of the public surveys over the tract, and then set off the quantity claimed. In other words, it was a public survey, and when the same was completed, the quantity claimed by the grantee was to be set off according to the lines thus established.

It necessarily follows that the general laws and practice of the land department in relation to the surveys of public lands must govern in this case. Had Congress intended that the rule applicable to the survey of private grants, established by the Act of 1864, should be retained in the special cases provided for in the 8th section of the Act of 1866, it is reasonable to presume that it would have indicated such purpose. But as no such purpose is indicated, it becomes necessary to consider the laws and practice of the department in relation to the *public* surveys.

By the Act of Congress, approved May 1st, 1796, (1 Stat., 464) "providing for the sale of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky river," the Surveyor-General was authorized to prepare plats of the townships surveyed, to keep one copy ot the same in his office for public information, and to send other copies to the "places of sale," and to the Secretary of the Treasury. The present local land offices are equivalent to the "places of sale" mentioned in the Act of 1796, and, as a matter of practice,

from that date to the present time, the township plats prepared by the Surveyor-General have been filed by him with the local officers, who thereupon proceeded to dispose of the public lands according to the laws of the United States. There is nothing in the Act of 1796, or in the subsequent Acts, which requires the approval of the Commissioner of the General Land Office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but is contrary to the uniform practice of this department.

There can be no doubt but that, under the Act of July 4, 1836, reorganizing the General Land Office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the Surveyor-General. But when the survey is correct, it becomes final and effective when the plat is filed in the local office by that officer. I do not think that this proposition can be successfully denied. Nor do I think it can be successfully asserted that a proceeding under the eighth section of the Act of 1866, was a survey of a private grant, in the correct acceptation of that term.

Admitting that the Land Department had supervision of the survey of the lands, including the tract in dispute, does it follow that it was inoperative until a decision was announced by said department, or, being correct, and having been made in accordance with the provisions of law, did it follow the uniform rule of public surveys and become operative when the provisions of said law had been complied with, and the plat filed in the local office in the usual manner?

I think the latter construction must prevail, and that the tract in dispute was public land at the date of selection by the State.

It is contended that the Hanson survey was not a legal one under the Act of 1866. It is too late to raise that question before this department. In 1871 the Secretary of the Interior recognized the survey; no error or fraud

was found therein, and the public lands designated by Surveyor-General became subject to disposal when the plats were filed in the local office, and remained so subject until the plats were withdrawn. Even should it be held that the survey of the private grant was irregular it would not necessarily affect the status of the public lands.

The case of *Taylor et al., vs. State of California* (Copp's Land Owner, vol. 2, p. 19), has been cited by counsel. But I do not think it is one in point. The "Albion" grant, under which that case arose, was not finally rejected by the Supreme Court until 1882; hence an attempted appropriation of land in 1867 was clearly illegal, as until the rejection of the grant the lands claimed were reserved from all appropriation. But in the case under consideration, the facts are that the Sausal Redondo was finally confirmed in 1857, and the survey and appropriation of the public land eleven years subsequent, were made, not contrary to law, but in strict compliance with law.

The case of *Shepley et al. vs. Cowan et al.* (1 Otto 330), is cited by counsel as governing the one under consideration. In that case, the Court held that the Land Department had control of the survey of public grants, and that the survey of such grant did not become final until approved by the proper officer. But, as before stated, the survey made by Hanson in 1868, of the tract in controversy, was a public survey of public land, and was governed by the laws and practice relating to the survey of other public lands, and the rule cited in *Shepley vs. Cowan*, does not apply.

The State selection appears to have been made in due form—it was approved as correct by your office and by this department, and in the absence of the proof of fraud, it must not be so recognized. It follows that the pre-emption claim of Foster, initiated subsequent to said selection, must fail.

The decision of my predecessor, dated October 11, 1876, is therefore reinstated.

In view of the fact that a supervisory control over the public surveys is vested in you by law, I would suggest that you instruct the Surveyor-General to submit for your approval all surveys and segregations made under the Act of 1866, prior to filing the same in the local office.

The papers in the case are herewith transmitted.

Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office."

The holding is here express, that, as the Hanson survey was made under the Act of 1866, it did not need the approval of the Commissioner to become final, but that that survey "*became final and effective when the plat was filed*;" and that, as was held in *Dodge vs. Perez, supra*, all State selections made during the time the plat was thus on file in the local land office, were valid.

But even had the survey not been made under the Act of 1866, yet this decision shows, and the facts as found by the trial Court show the same—(Transcript of Record, p. 27), that by the Hanson survey of February, 1868, the lands in controversy were excluded from the limits of the Sausal Redondo, and that that survey was, after rejection of the Thompson survey, approved by the Commissioner of the

General Land Office in August, 1875. *Huff vs. Doyle*, 93 U. S., 558, is hence not inapplicable here. In that case the plaintiff, having settled on the land in 1865, before United States survey, claimed the benefit of the statute of 1866, the land at the time of selection being within the claimed limits of a valid Mexican grant. For this reason, the California Court held that plaintiff could not take the benefit of the statute of 1866. But the judgment of that Court was reversed by this Court, on the ground that, as at the time the land officers were to decide on the validity of the State selection, the official plat of survey showed that no claim under the grant existed, and as the plaintiff promptly at such time sought the relief of the statute he was within its remedial provisions. And MR. JUSTICE MILLER, in delivering the opinion of the Court, uses the following language: "In all this we see the purpose of Congress to refer the exercise of the right of the State to select indemnity for school lands to the condition of the lands for which indemnity is sought, as well as those out of which it is sought, at the time the official surveys are made and filed in the proper office, or as soon thereafter as the right is asserted."

Thirdly. The Act of Congress of March 1, 1877, popularly known as the "Booth Bill," cures, and was passed for the express purpose of curing,

all the defects asserted against the title of parties standing in the category of defendant in error.

The decision of the Supreme Court is not rested, it is true, upon the Booth Bill, that Court determining the title of defendant in error to be safe from attack, independently of such aid. But an appellate tribunal never reverses a judgment simply because the grounds upon which the Court has placed its decision are erroneous. If there can be found any ground upon which to rest an affirmance, such ground is invariably selected. If, therefore, the Court, to which the present writ of error has run, has erred in its grounds of decision, and yet it shall be found that the Booth Bill is sufficient to warrant an affirmance of the judgment, we take it, this Court will proceed accordingly. That statute is as follows:

"AN ACT relating to indemnity school selections in the State of California.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to the lands certified to the State of California, known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said State, is hereby confirmed to said State in lieu of the sixteenth and thirty-sixth sections, for which the selections were made.

SEC. 2. That where indemnity school selections have been made and certified to said State, and said selection shall fail by reason of the land in lieu of which they were taken

not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, That if there be no such sixteenth or thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land-office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land-laws of the United States.

SEC. 3. That the foregoing confirmation shall not extend to the lands settled upon by any actual settler claiming the right to enter not exceeding the prescribed legal quantity under the homestead or pre-emption laws: *Provided*, That such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior: *And provided further*, That the claim of such settler shall be presented to the register and receiver of the district land-office, together with the proof of his settlement and residence, within twelve months after the passage of this act, under such rules and regulations as may be established by the Commissioner of the General Land-Office.

SEC. 4. That this act shall not apply to any mineral lands, nor to any lands in the city and county of San Francisco, nor to any incorporated city or town, nor to any tide, swamp, or overflowed lands.

Approved, March 1, 1877.

It having been claimed that the statute did not cover selections which might be invalid by reason of the condition of the land selected, but simply those whose invalidity arose by reason of the want of any basis for the indemnity, that question was submitted for decision, by Secretary Schurz to Attorney-General Devens, who replied that such selections were within the remedial provisions of the statute. We give his opinion in full :

"DEPARTMENT OF JUSTICE,
Washington, July 12, 1878.

HON: CARL SCHURZ,
Secretary of the Interior :

SIR :—It appears, from your communication of February 28th, 1878, that, by the sixth section of an Act of Congress, approved March 2d, 1853, entitled "An Act to provide for the survey of the public lands in California, and the granting of pre-emption rights therein, and for other purpose," the sixteenth and thirty-sixth sections of land in each township in California, were granted to said State for school purposes (10 Stats., 244).

By the seventh section of the same Act, indemnity was provided for such sections or parts of sections as might be occupied by actual settlers at the date of survey, or where such sections were reserved for public uses, or taken by private claims, and thereby lost to the State.

Many of the sixteenth and thirty-sixth sections granted by said Act were found on examination to be located within the claimed limits of private grants made by Spanish or Mexican governments, the boundaries of which had not been specifically determined by final survey.

Before it was ascertained whether such school sections were lost to the State by being included within the limits of the final surveys of such private grants, the State pro-

ceeded to make indemnity selections in lieu of such lands. In some cases, two or more selections were made in lieu of the same sixteenth or thirty-sixth section; in other cases, selections were made in lieu of sixteenth and thirty-sixth sections which had no existence, and in others, the lands selected as indemnity were in a state of reservation at the date of selection, and the selections were invalid for that reason.

These irregularities seem to have escaped the attention of the Land Department, and the lands were certified to the State as valid selections. The lands so selected by the State had, in many instances, been settled upon and improved by qualified pre-emption claimants, some of whom settled before, and some after, the lands were certified to the State, and great confusion was occasioned by these conflicting claims, which finally resulted in the passage of "An Act relating to Indemnity School Selections in the State of California, approved March 1, 1877 (19 Stats.,267).

The question presented by your letter is as to the construction of the words "or are otherwise defective or invalid," which are found in the second section of the Act of March 1, 1877, the inquiry being whether these words apply to and confirm all indemnity school selections invalid for any reason, which had been certified to the State prior to the passage of said Act, or whether by the true construction of this section it is only intended to confirm to the State its selections in those cases in which the sixteenth and thirty-sixth sections are found not to have been included within the limits of a Mexican grant, and therefore to have been such that the State would have been entitled to them and of course would not have been entitled to indemnity for their loss.

The first section of this Act confirms the title to the lands certified to the State of California, known as "Indemnity School Sections," which had been selected in lieu of sixteenth and thirty-sixth sections lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by the State. As the State was en-

titled to indemnity according to the previous law for these sections, the only object of this section of the statute was therefore to confirm the title where the selections had been made in anticipation of the final survey.

The second section of the Act is as follows: "That where the indemnity school selections have been made and certified to said State and said selection shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States, *Provided*, That if there be no such sixteenth or thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser, for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person. *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment of such land, it shall be subject to the general land laws of the United States."

It is not questioned that the effect of this section is to confirm to the State of California the selection of lands made by it as indemnity for those sections which have been since found not to have been included within the final survey of a Mexican grant, and to reinvest the United States with the title thereto, to be disposed of as other public lands of the United States. But it is contended that the words "or are otherwise defective or invalid," when applied to the selections made by the State of California, cannot be construed as investing that State with the title, if, at the time the selections were made by it, the lands selected were reserved by the United States. It could not be argued that the confirmation of the United States could extend beyond its own title, nor that this language could

operate to cure defects and invalidities of which others were entitled to take advantage. But in the view of the case which presents itself to me, it seems that these words are intended to confirm to the State, in spite of any defects or invalidities which have existed in its selections, the lands selected, other than the defect arising from the fact that there was no original basis for the selection, and that a confirmation of this character can only be interpreted properly as in the nature of a grant *de novo* of the lands thus selected.

It has been argued that where lands have been selected in lieu of other lands which could properly have come to the party entitled to select, such selection might be treated as avoidable only, and that such was the intention of Congress in this Act, while, where the selection was made of lands which were in reservation, such selection was, of necessity, void. Without undertaking to discuss the well-known distinction between those Acts which are void and those which are voidable only, it is difficult to see why, when the basis of the selection itself is wanting, the selection is not as much void as it is when the land selected was not at the time subject to selection. The statute is in its nature a remedial statute, is to be construed generously in order to give to the State the benefit which it was intended to receive for school purposes, and to relieve the difficulties which had arisen in the State by reason of the peculiar complications from the Mexican grants.

By other parts of the statute it will be seen that the rights of actual settlers are carefully guarded, and in a question of interpretation between the United States and the State, the words "or are otherwise defective or invalid" are to be construed so as to carry out the evident idea of the statute in confirming to the State the selections which had been made by it.

I am, therefore, of opinion that where it has been found that the selection made by the State was a selection of land then in reserve, and that in that way the selection of the State is defective and invalid, the words "or are other-

wise defective or invalid" are to be so construed as to confirm this selection to the State. The words "or are otherwise defective or invalid" clearly point to defects different from those which have arisen by reason of the fact that there had been no loss of lands in lieu of which selections were made. And, to judge from the correspondence connected with your letter, the defect which has most generally occurred has been by reason of the selection of property of the United States which at that time was in reserve. It was entirely competent for the United States, as between it and the State of California, to grant this, and when the general object of the statute is considered the interpretation that in such case it does grant, it seems to be a reasonable and proper one.

Of course it is to be understood in this connection that where there was no 16th or 36th section, which is the case covered by the proviso of the second section, no title can pass to the land thus selected, and such intention is clearly indicated by the proviso, which in such case permits an innocent purchaser to receive a title to it upon proving the fact before the proper land-office and payment of $1.25 per acre, provided that he makes such application within a reasonable time; and if no such application be made, enacts that it shall be subject to the general land laws of the United States.

As I am informed by your letter that in certain cases two or more selections have been made in lieu of the same 16th or 36th section of land, I ought to add that I do not by this opinion intend to imply that the State is entitled to more than selection in lieu of any one section. By the Statute of July 23, 1866, in regard to school lands in California, it was provided that the State of California could not receive under this Act a greater quantity of land for school improvement purposes than she was entitled to by law, and although this proviso is not repeated in the Act which we are at present considering, yet there is nothing in it from which it can fairly be inferred that where double selections are made, they were to be ratified, or that the

State was by reason of any mistake in the making of duplicate selections to obtain a greater quantity of land than had originally been allowed by law for school purposes.

In conclusion, I should, perhaps, call attention to the third and fourth sections of the Act we are discussing.

The third section provides that the confirmation shall not extend to lands settled upon by actual settlers, not exceeding the prescribed legal quantity, provided such settlement was made in good faith and prior to the date of certification of the lands to the State; and provided further, that the claims of such settlers should be presented to the register and receiver of the district land-office within a time named; and the fourth section provides that the Act shall not apply to certain lands therein specified. In immediate answer, therefore, to the inquiry of your letter, I would say that the words 'or are otherwise defective or invalid,' refer to selections that are invalid or defective for some other reason than that the lands in lieu of which they were made shall be excluded on final survey from a Mexican grant, and that a simple confirmation to the State of such lands because the selections were otherwise defective or invalid on account of the condition of the lands when selected was all that was necessary to quiet the title of the State to them.

Very respectfully,

Your obedient servant,

CHAS. DEVENS,

Attorney General."

To the same effect is *Fletcher vs. Mower*, 55 Cal., 119-122.

It will be seen that the statute saves the rights of those who made settlements *prior* to the listment to the State, and thus accords, as has been shown *supra*, with the ruling made by the Secretary of the Interior in the Selby case. As neith-

er of the plaintiffs is within this saving clause, the Statute operates to confirm the State selections under which defendant in error claims.

But it has been said, and it may be said here, that, as our complaint was filed in November, 1876, and the Booth Bill passed in March, 1877, we had no title at the time of the commencement of the action on which we could sustain ejectment. In other words, that the action was prematurely brought.

That the Booth Bill was intended to be, and is, retroactive, a reading of the statute makes plain beyond doubt. By the very words of the statute, the invalid State selections are made valid, and by the proviso in the third section, the rights of those settlers only are protected who settled "*prior to the date of certification of said land to the* "*State of California by the Department of the Inte-*" *rior.*"

As is well said in *Yoakum vs. Brower*, 52 Cal., 376, in regard to the State Curative Act of 1872, "The act has, and it was intended that is should have, a retroactive effect. Its purpose was to afford relief to those who had become purchasers of State land, but who, because of some defect in the proceedings, or some default on their part, could not, under the laws then in force, procure title to the lands by means of the proceedings already initiated. A purchaser who had made a

valid application, and who had received a valid certificate of purchase, which had been regularly issued, needed no act for his relief. The act is operative not only upon applications which were defective *in form*, but those which were defective *in substance*, or were *invalid for any other reason*," etc.

See, also, *Wanzer vs. Somers*, 53 Cal., 90.

We are not dealing here with a confirmation by a private individual, but with a confirmation by the sovereign; and even though the listment of the lands in controversy were absolutely void, yet this confirmatory act makes them as good as though they never had been tainted with infirmity. As is said in *Branham vs. Mayor*, 24 Cal., 605, "The only exception to this rule" (the rule that a void act is incapable of confirmation) "is where the confirmation is the act of sovereign will. It was upon this view that the act of 1858, confirming the so-called 'Van Ness Ordinance,' was passed; and the validity of that ordinance upheld in *Hart vs. Burnett*."

Before the trial of the case, the title of plaintiff, if defective, had therefore been made good as of a date long anterior to the commencement of the action. To say otherwise, is simply to say that the Confirmatory Act is not retroactive.

In the case of *Hutchinson vs. The Chicago and N. R. R. Co.*, 41 Wisconsin, 541–550–551, which was an action in the nature of trespass, the plaintiffs relied on a deed which had been executed *pendente lite*, and which deed included land not included in a former deed. The land had been intended to be conveyed by the former deed, but through mistake had been left out of the description. The Court say:

"The plaintiff purchased all of the interest of James Hutchinson in the property in question in 1865. The latter intended to convey the same to the plaintiff, and doubtless both supposed he had done so. James surrendered the possession of the property to the plaintiff, and, when the defect in this conveyance was discovered, he executed to the plaintiff a new and corrected conveyance of the property. It seems very clear to our minds that the deed of 1874, was properly admitted in evidence; that it cures the defect in the deed of 1865; and that the rights of the plaintiff were the same as though the former deed had been correctly drawn in the first instance."

And again: "Had an action been brought in equity after the commencement of this action to reform the deed of 1865, and had a judgment reforming the same been obtained before the trial of this action, we cannot doubt that the reformed deed would have taken effect by re-

lation as of the time the erroneous deed was executed, and that such deed and the judgment reforming it, if put in evidence, would have completed the proofs of plaintiff's title to the whole seven acres."

And the Court proceed to say that there was no valid reason why the conveyance "should not have the same effect as though the correction had been made by the judgment of a court of equity instead of the voluntary act of the parties interested."

In *Gallup vs. Armstrong*, 22 Cal., 480, plaintiff proved his possession prior to the entry of defendants, and that he had located a military land warrant on the tract. He then offered in evidence the patent issued to him after the commencement of the action in pursuance of his location, and it was held that the patent was admissible in evidence, the court saying, through Crocker, J., "it seems that one of his claims to the possession was founded on the location of a land warrant prior to the commencement of the action, and we see no valid objection to the admission of the purpose for which it was offered. It was not offered to prove a right of possession acquired since the commencement of the suit. If it had been offered or used for such a purpose it would have been inadmissible. But it was competent for the plaintiff to prove that the right of

possession acquired by the location of the land warrant had since ripened into a perfect title, even though it occurred since the commencement of the action."

The Booth Bill is not a grant, nor does it purport to be such. It is remedial and confirmatory in its scope and operation. It remedies the defects in certain proceedings leading up to the grant of the sovereign, and confirms the title attempted to be conveyed by the grant. It can scarcely therefore be said that we cannot draw this statute to our aid although passed for our benefit subsequently to the commencement of proceedings taken to assert a right which the statute had perfected.

The power of Congress to enact such legislation as the Booth Bill, as against parties standing in the position of plaintiff in error, is well settled:

Frisbie vs. Whitney, 9 Wall., 191.
The Yosemite Valley Case, 15 Id., 77.
Hutton vs. Frisbie, 37 Cal., 490.

III.

Plaintiffs in error set up certain matters in their answers which were found in their favor by the trial Court, as to certain claimed defects in the applications in accordance with which the State patent was issued, and also claim that a fraud was practised on the State by more land being taken

up than the land warranted. All this is irrelevant, and was so treated by the trial Court in its conclusions of law (Transcript of Record, p. 52). Plaintiffs in error do not pretend to be in any privity with the State. Their claim is hostile to her. It can make no difference to them as to whether or not the proceedings leading up to the State patent are valid. If their contention is sound, and they can be permitted to attack the patent, or show that no title passed to the State by the listment, it follows that the patent would fall, even though all the antecedent proceedings were strictly regular. Whether, therefore, those proceedings are good or bad, is not a matter of the slightest moment to them. As the Court well say in *Thomas vs. Lawler*, 53 Cal., 407: "The respective parties proceeded in different modes to acquire the title to the land; the facts upon which they must rely may be essentially different in the respective applications; and they seek to acquire the title from different sources. The one application bears no relation to the other, and the false statements in the one afford no ground upon which the other applicant can claim that he first acquired the title from one source of title in trust for the other applicant, who was seeking to acquire the title from another source. The defendant was not entitled to any relief upon his alleged equitable defense, and it should have been dismissed."

And so the Secretary of the Interior held in his supplemental decision in the Foster case, a copy of which is as follows:

"DEPARTMENT OF THE INTERIOR,
Washington, April 3d, 1878.

SIR:—I have considered the application of Messrs. Luce and Johnston, attorneys for the heirs of David Foster, for a modification of so much of my decision of August 7th, 1877, as related to the N. W. ¼ of Section 24, Township 2 South, Range 14 West, S. B. M., Los Angeles, California, holding that the State selection was valid and the pre-emption claim of Foster must be rejected.

This application is based upon the ground that the State selection was illegal and invalid, because not made in accordance with the provisions of an Act of the Legislature of the State of Calitornia, approved March 27th, 1863. It is not considered necessary at this time, however, to enter into a consideration of the alleged defects in the application of the purchaser; that is a question between him and the State, and does not in my opinion enter into the merits of the question now before me. By the 7th section of the Act of March 3, 1853, the State of California was granted indemnity for sections 16 and 36 lost in private grants. The manner of selecting such indemnity is not specified. The Act of April 27th, 1863, was an Act by the Legislature of California, providing for the sale of certain lands belonging to the State, and if purchasers under the same fail to comply with the requirements of the statute, their claims may fail. (51 Cal., 128).

The records of your office show that under date of April 22, 1868, the State Locating Agent made application to select the tract in question in lieu of land lost in a private grant. The tract was selected for the State in accordance with the provisions of the Act of March 3, 1853. The records also show that the Register of the United States Land Office at San Francisco certified that the authorized agent

for the State had selected the tract in question, in part satisfaction of the grant made by the Act of March 3, 1853. The action of the department approving the tract to the State was based upon these certificates. The questions to be considered by the Government were, 1st, the right of the State to claim the land under her grant, and 2d, was the tract subject to selection. Both these questions were determined in the affirmative, and in accordance with the facts. These were the only questions that it was necessary for the Government to determine, as it recognizes only the State in the proceedings, and it was no part of its duty to inquire into the transactions between the State and her purchaser. Neither will it go back of the records to ascertain whether, as between the State and her agent, he complied with the provisions of her statute, relating to the sale of granted lands. The Department can look to the State only in the adjustment of a grant made to her. There is no complaint on the part of the grantee of irregularity in the selection; on the contrary, it has been recognized and approved, and patent issued to the purchaser January 31, 1873. Furthermore, the Legislature of the State of California passed an Act for the relief of purchasers of State lands approved March 27, 1872, providing that "when application has been made to purchase lands from this State, and payment made to the Treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent had been issued to the applicant, the title of the State to said lands is hereby vested in said applicant, or his assigns, upon his making full payment therefor, provided, that no other application has been made for the purchase of the same lands prior to the issuance of said certificate of purchase."

The State has thus, in the most emphatic manner, asserted her claims to the lands granted and approved to her, notwithstanding an alleged irregularity on the part of her agent in selecting the same.

The records show that the State was entitled to the tract of land claimed as indemnity, that it was subject to

selection, that said selection was made by the authorized agent of the State in accordance with the usages and practice of the Department, that it was approved in the usual manner by the Secretary of the Interior, and that the State has not relinquished her claim. Further than this the Department will not inquire upon the motion of any party not in interest as grantor or grantee.

The application must be denied, and the papers are herewith transmitted.

Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.''

But the matters complained of are not sufficient to avoid the patent, as held in *Churchill vs. Anderson*, 56 Cal., 60. And if a fraud was practised upon the State, that is a matter between her and her fraudulent grantee—certainly a party claiming under the United States cannot be heard. If it were at all pertinent to the case, we could demonstrate by an examination of the laws of California that, at the time of the applications complained of, there was no limit as to the quantity of lieu land any one person might acquire from the State; and, if it were permissible to look into the evidence in the record, it would be seen that these aggrieved pre-emptors are not pre-emptors at all, and that none of them had the slightest idea of inhabitancy, improvement, or the erection of a dwelling, all of which are absolutely necessary to the acquirement of the pre-emption right. They did here what pre-emptors (?) have so fre-

quently done—entered upon the possession of others whose rights had been injuriously affected by some ruling in the Courts or in the land department.

The parties prosecuting this writ of error have, as we have shown, been ruled against by the Land Department in all its branches, by the Supreme Court of California, by the Attorney-General of the United States, and by Congress. Let us hope that this Court will give them the *coup de grace*, so that the litigation industriously promoted by them for so many years may be finally brought to a close.

No. 312 (*B. F. Good, et al. vs. M. J. O'Connor*), and No. 313 (*Daniel Hazard et al. vs. M. J. O'Connor*), present precisely the same questions as are presented by the Frasher case. In those cases, the trial Court gave judgment for the plaintiff (defendant in error here) on the authority of the Frasher case, and on the same authority the Suprme Court of California, affirmed the judgments. (Transcript of Record of No. 312, p 38, and No. 313, p. 21). We, therefore, beg leave to submit those cases, on behalf of defendant in error, on the argument had in the Frasher case.

Respectfully submitted.

EDWARD R. TAYLOR,
Counsel for Defendant in Error.